

Title VII and Friendship, Commerce, and Navigation Treaties: Prognostications Based upon *Sumitomo Shoji*

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I. INTRODUCTION

Since 1778 bilateral friendship, commerce, and navigation (FCN) treaties have formed the legal framework for the conduct of commercial transactions by citizens of the United States abroad and by foreign citizens in the United States.¹ Although the more than 130 FCN treaties to which the United States is a party² differ in name, scope, and form, their general aim has been to "define the treatment each country owes the nationals of the other; their rights to engage in business and other activities within the boundaries of the former; and the respect due them, their property and their enterprise."³

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1. The first FCN treaty between the United States and another country was the Treaty of Amity and Commerce, Feb. 6, 1778, United States-France, 8 Stat. 12, T.S. No. 83. The FCN treaties negotiated between 1778 and 1949 can be found in *TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949* (C. Bevans ed. 1968-1976). The post-World War II FCN treaties are: Treaty of Amity and Economic Relations, Feb. 8, 1967, United States-Togo, 18 U.S.T. 1, T.I.A.S. No. 6193; Treaty of Amity and Economic Relations, May 29, 1966, United States-Thailand, 19 U.S.T. 5843, T.I.A.S. No. 6540; Treaty of Friendship, Establishment and Navigation, Feb. 23, 1962, United States-Luxembourg, 14 U.S.T. 251, T.I.A.S. No. 5306; Treaty of Amity and Economic Relations, Nov. 30, 1961, United States-South Vietnam, 12 U.S.T. 1703, T.I.A.S. No. 4890; Treaty of Friendship, Establishment and Navigation, Feb. 12, 1961, United States-Belgium, 14 U.S.T. 1284, T.I.A.S. No. 5432; Convention of Establishment, Protocol, and Declaration, Nov. 25, 1959, United States-France, 11 U.S.T. 2398, T.I.A.S. No. 4625; Treaty of Friendship, Commerce and Protocol, Nov. 12, 1959, United States-Pakistan, 12 U.S.T. 110, T.I.A.S. No. 4683; Treaty of Amity, Economic Relations and Consular Rights, Dec. 20, 1958, United States-Muscat and Oman, 11 U.S.T. 1835, T.I.A.S. No. 4530; Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, United States-South Korea, 8 U.S.T. 2217, T.I.A.S. No. 3947; Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942; Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, United States-Nicaragua, 9 U.S.T. 449, T.I.A.S. No. 4024; Treaty of Amity, Economic Relations and Consular Rights, Aug. 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853; Treaty of Friendship, Commerce, and Navigation, Oct. 29, 1954, United States-West Germany, 7 U.S.T. 1839, T.I.A.S. No. 3593; Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863; Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, United States-Denmark, 12 U.S.T. 908, T.I.A.S. No. 4797; Treaty of Amity and Economic Relations, Sept. 7, 1951, United States-Ethiopia, 4 U.S.T. 2134, T.I.A.S. No. 2864; Treaty of Friendship, Commerce and Navigation, Aug. 23, 1951, United States-Israel, 5 U.S.T. 550, T.I.A.S. No. 2948; Treaty of Friendship, Commerce and Navigation, Aug. 3, 1951, United States-Greece, 5 U.S.T. 1829, T.I.A.S. No. 3057; Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, United States-Ireland, 1 U.S.T. 785, T.I.A.S. No. 2155; Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, United States-Italy, 63 Stat. 2255, T.I.A.S. No. 1965; Treaty of Friendship, Commerce and Navigation, Nov. 4, 1946, United States-Taiwan, 63 Stat. 1299, T.I.A.S. No. 1871. For a discussion of these treaties, see Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229 (1956).

2. The count "more than 130" is based on a State Department fact sheet. U.S. DEPT OF STATE, *COMMERCIAL TREATY PROGRAMS OF THE UNITED STATES* 3 (1952). This figure has been accepted widely and cited by authors and courts. See Walker, *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373, 374 (1956); see also *Linskey v. Heidelberg E., Inc.*, 470 F. Supp. 1181, 1185 (E.D.N.Y. 1979); H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 498 (1968).

3. Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 806 (1958).

A key provision of the FCN treaties negotiated since the end of World War II gives investors the right to control and manage enterprises they establish or acquire in the host country.⁴ Another important aspect of these treaties is the right of nationals and companies to engage managerial, professional, and other specialized personnel of their choice in the host country.⁵

In recent years the question has arisen whether the "of their choice" provision in certain FCN treaties exempts foreign companies operating in the United States from federal employment discrimination laws.⁶ In particular, litigants have asked a number of courts, in the context of the Treaty of Friendship, Commerce and Navigation between the United States and Japan,⁷ whether wholly owned subsidiaries of Japanese corporations, incorporated in the United States, have an absolute right to hire managerial personnel of their choice irrespective of Title VII of the Civil Rights Act of

4. The following post-World War II FCN treaties give citizens of either country the right to control and manage enterprises that they establish or acquire in the host country (full citations to the treaties can be found *supra* note 1): Belgium (at art. VI(1)); Denmark (at art. VII(2)(d)); Ethiopia (at art. VIII(5)); France (at art. V(1)(c)); West Germany (at art. VII(1)(c)); Greece (at art. XIII(1)); Iran (at art. III(2)); Japan (at art. VII(1)(c)); South Korea (at art. VII(1)(c)); Luxembourg (at art. VI(1)(c)); Muscat and Oman (at art. V(3)); Netherlands (at art. VII(1)(c)); Nicaragua (at art. VII(1)(c)); Pakistan (at art. VII(1)); Taiwan (at art. IV(2)); Thailand (at art. IV(5)); Togo (at art. V(3)); South Vietnam (at art. V(2)).

5. The following post-World War II FCN treaties give the parties the right to engage specified managerial and technical personnel of their choice in the host country (full citations to the treaties can be found *supra* note 1): Belgium (at art. VIII(1)); Denmark (at art. VII(4)); Ethiopia (at art. VIII(5)); France (at art. VI(1)); West Germany (at art. VIII(1)); Greece (at art. XII(4)); Iran (at art. IV(4)); Ireland (at art. VI(1)); Israel (at art. VIII(1)); Italy (at art. I(2)); Japan (at art. VIII(1)); South Korea (at art. VIII(1)); Luxembourg (at art. VIII(1)); Muscat and Oman (at art. V(3)); Netherlands (at art. VIII(1)); Nicaragua (at art. VIII(1)); Pakistan (at art. VIII(1)); Taiwan (at art. II(2)); Thailand (at art. IV(6)); Togo (at art. V(3)); South Vietnam (at art. V(2)).

6. See *Spieß v. C. Itoh & Co. (Am.)*, 469 F. Supp. 1 (S.D. Tex. 1979), *rev'd*, 643 F.2d 353 (5th Cir. 1981), *vacated and remanded*, 102 S. Ct. 2951 (1982); *Linskey v. Heidelberg E., Inc.*, 470 F. Supp. 1181 (E.D.N.Y. 1979); *Avigliano v. Sumitomo Shoji Am., Inc.*, 473 F. Supp. 506 (S.D.N.Y. 1979), *aff'd*, 638 F.2d 552 (2d Cir. 1981), *rev'd and remanded*, 102 S. Ct. 2374 (1982) (At the Supreme Court level, "Avigliano" was spelled "Avagliano." The parties, however, remained the same despite the difference in spelling.); *Porto v. Canon, U.S.A., Inc.*, 28 Fair Empl. Prac. Cas. (BNA) 1679 (N.D. Ill. 1981); *Mattison v. Canon, U.S.A., Inc.*, 28 Fair Empl. Prac. Cas. (BNA) 1685 (N.D. Ill. 1981).

7. Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 [hereinafter cited as United States-Japan FCN Treaty]. The United States-Japan FCN Treaty was part of a post-World War II program to develop a series of commercial treaties whose general aim was to "facilitate the protection of American citizens and their interests abroad." *Commercial Treaties—Treaties of Friendship, Commerce and Navigation, with Israel, Ethiopia, Italy, Denmark, Greece, Finland, Germany and Japan: Hearings Before the Subcomm. of the Senate Comm. on Foreign Relations*, 83d Cong., 1st Sess. 1 (1953) (statement of Assistant Secretary of State for Economic Affairs, Samuel C. Waugh) [hereinafter cited as *Hearings*]. According to its preamble, the United States-Japan FCN Treaty was to achieve this goal "by arrangements promoting mutually advantageous commercial intercourse, encouraging mutually beneficial investments and establishing mutual rights and privileges." United States-Japan FCN Treaty, *supra*, at preamble. The importance of the Treaty "arrangements" regarding "commercial intercourse" and the promotion of "mutually beneficial investments . . . [and] rights and privileges" was emphasized during the Senate hearings on the Treaty. *Hearings, supra*, at 26-27. U. Alexis Johnson, then Deputy Assistant Secretary of State for Far Eastern Affairs, told the Senate Subcommittee on Foreign Relations that

[t]he treaty is designed to protect American interests already established in Japan or which may become established in the future. It is designed to afford the maximum opportunity to the citizens of both countries to exercise their abilities, industry and resources constructively in business relationships with each other. It will provide a legal framework within which economic relations between the two countries can be developed to their mutual advantage.

Id. at 27. For a brief discussion of the Treaty, see S. METZGER, *INTERNATIONAL LAW, TRADE AND FINANCE* 147-55 (1962).

1964.⁸ The two federal courts of appeals⁹ that considered this question not only differed with their district courts on whether the subsidiary possesses the same rights as its Japanese parent corporation,¹⁰ but also differed with each other on the scope of rights created by the "of their choice" provision.¹¹ The United States Supreme Court granted certiorari to resolve this conflict between the circuits,¹² but chose, in *Sumitomo Shoji America, Inc. v. Avagliano*,¹³ to avoid a discussion of the relationship between the rights conferred under the "of their choice" provision and Title VII. Instead, the Court held that a Japanese company's wholly owned subsidiary, incorporated under the laws of New York, is a company of the United States and, therefore, cannot directly assert rights under the United States-Japan FCN Treaty as a defense to an employment discrimination suit under Title VII.¹⁴

Although *Sumitomo* is expressly limited to the issue of corporate nationality, the Supreme Court specifically raised but expressed no opinion on four important questions relating to FCN treaties. First, what impact will the decision have on the more than twenty other FCN treaties that have different negotiation histories but contain "of their choice" language substantially similar to the United States-Japan FCN Treaty?¹⁵ Second, can a wholly

8. 42 U.S.C. §§ 2000e to 2000e-17 (1976). The pertinent part of the statute for this litigation is § 2000e-2(a), which provides:

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin

Although article VI of the Constitution states that treaties and acts of Congress are both "the supreme law of the land," it does not provide any guide for resolving conflicts between the two. Since treaties and acts of Congress are given equal status by the Constitution, the Supreme Court has held that "the one last in date will control the other." *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). The effect of an act of Congress on a conflicting treaty was considered in the *Head Money Cases*, 112 U.S. 580 (1884), in which the Supreme Court held that "so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance by the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal." *Id.* at 599. See also *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Whitney v. Robertson*, 124 U.S. 190 (1888). Similarly, the Supreme Court has held that a later treaty may supersede an earlier act of Congress. See *Cook v. United States*, 288 U.S. 102, 118-19 (1933).

9. See *Avigliano v. Sumitomo Shoji Am., Inc.*, 638 F.2d 552 (2d Cir. 1981); *Spieß v. C. Itoh & Co. (Am.)*, 643 F.2d 353 (5th Cir. 1981).

10. In *Spieß v. C. Itoh & Co. (Am.)*, 469 F. Supp. 1 (S.D. Tex. 1979), and *Avigliano v. Sumitomo Shoji Am., Inc.*, 473 F. Supp. 506 (S.D.N.Y. 1979), the district courts held that since the defendant companies were incorporated in the United States they were not Japanese companies within the meaning of article XXII(3) of the United States-Japan FCN Treaty and thus could not rely on the Treaty to sanction their employment practices. Despite this agreement between the district courts, the United States Court of Appeals for the Second Circuit in *Avigliano v. Sumitomo Shoji Am., Inc.*, 638 F.2d 552 (2d Cir. 1981), and the United States Court of Appeals for the Fifth Circuit in *Spieß v. C. Itoh & Co. (Am.)*, 643 F.2d 353 (5th Cir. 1981), held that the subsidiaries were included in the Treaty.

11. The Second Circuit in *Avigliano* held that Title VII should be construed in light of the Treaty to allow a subsidiary to invoke the bona fide occupational qualification exemption and to employ Japanese nationals in positions in which that nationality was reasonably necessary to the successful operation of the company's business. 638 F.2d 552, 559 (2d Cir. 1981). See *infra* text accompanying notes 51-52. The Fifth Circuit in *Spieß*, however, held that the Treaty provided an absolute exemption from Title VII. 643 F.2d 353, 363 (5th Cir. 1981).

12. *Sumitomo Shoji Am., Inc. v. Avagliano*, 454 U.S. 962 (1981).

13. 102 S. Ct. 2374 (1982).

14. *Id.* at 2378-79.

15. *Id.* at 2380 n.12.

owned American subsidiary of a foreign corporation assert FCN treaty rights on behalf of its parent?¹⁶ Third, does discrimination based on national citizenship rather than national origin violate Title VII?¹⁷ Fourth, may a foreign-owned American subsidiary successfully assert foreign citizenship as either a bona fide occupational qualification (BFOQ) or a business necessity defense to an employment discrimination action under Title VII?¹⁸ Because of the importance of these unresolved issues to foreign investment in the United States,¹⁹ this Article will analyze the *Sumitomo* decision, methods of treaty interpretation, the relationship between parent and subsidiary corporations, and Title VII. In so doing this Article reaches three principal conclusions. First, based on techniques of treaty construction, courts interpreting other FCN treaties may reach different conclusions whether American subsidiaries have rights directly under the "of their choice" provisions. Second, if the courts adopt the position of the Supreme Court in *Sumitomo*, they then must consider the relationship between the parent and the subsidiary to determine whether the personnel policies and practices at issue are really those of the parent and if so, whether the subsidiary has standing to assert the third-party rights of its parent. Last, the BFOQ and business necessity defenses to Title VII should be applied after carefully analyzing the business environment, customs, and mores of the countries with which American subsidiaries must deal.

II. *SUMITOMO SHOJI AMERICA, INC. v. AVAGLIANO*

In November 1977 eleven women, all employees or former employees of Sumitomo Shoji America, Inc., a company incorporated in New York as a wholly owned subsidiary of a Japanese corporation,²⁰ filed suit in federal district court in New York alleging sex and national origin discrimination in violation of Title VII²¹ and the Civil Rights Act of 1866.²² The plaintiffs

16. *Id.* at 2382 n.19.

17. *Id.* at 2377 n.4.

18. *Id.* at 2382 n.19.

19. While this Article will focus primarily on the relationship between Title VII and the FCN treaties, it also will consider the defenses other foreign investors may have under *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973), the BFOQ exception, and the business necessity defense.

20. Sumitomo Shoji Kabushiki Kaisha, the Japanese parent corporation, is a general trading company, or "sogo shosha." In *Sumitomo* the Court discussed the function of these companies at some length:

General trading companies have been a unique fixture of the Japanese economy since the Meiji era. These companies each market large numbers of Japanese products, typically those of small concerns, and also have a large role in the importation of raw materials and manufactured products to Japan. In addition, the trading companies play a large part in financing Japan's international trade. The largest trading companies—including Sumitomo's parent company—in a typical year account for over 50% of Japanese exports and over 60% of imports to Japan. See Krause & Sekiguchi, Japan and the World Economy, in H. Patrick & H. Rosovsky, *Asia's New Giant: How the Japanese Economy Works* 383, 389-397 (1976).

102 S. Ct. 2374, 2376 n.1 (1982).

21. 42 U.S.C. §§ 2000e to 2000e-17 (1976). See *supra* note 8.

22. 42 U.S.C. § 1981 (1976) (originally enacted as the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, and the Enforcement Act of 1870, ch. 14, § 16, 16 Stat. 144). Section 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal

claimed that Sumitomo discriminated against them by restricting them to clerical jobs and by refusing to train them or promote them to executive, managerial, or sales positions. The plaintiffs alleged that those positions were reserved exclusively for male Japanese citizens.²³

Sumitomo responded that article VII of the United States-Japan FCN Treaty authorizes Japanese corporations to organize branches, affiliates, and subsidiaries in the United States.²⁴ It asserted that under article VIII of the Treaty Japanese companies may staff these branches, affiliates, and subsidiaries with managerial, professional, and other specialized personnel "of their choice."²⁵

Plaintiffs countered these arguments by maintaining that the rights and immunities conferred by the Treaty applied only to the Japanese parent company. Since Sumitomo was incorporated in the United States, it was a company of the United States and lacked standing to raise the Treaty rights of its parent. In addition, the plaintiffs argued that even if Sumitomo had rights under article VIII, those rights did not immunize it from Title VII. According to the plaintiffs, articles VII and VIII provided only "national treatment" for any employment practice authorized by the Treaty. The practice then must be consistent with the prohibitions of Title VII.²⁶

A. District Court Decision

In ruling on Sumitomo's motion to dismiss the action, the United States District Court for the Southern District of New York did not decide whether the "of their choice" language in article VIII was sufficiently broad to exempt an American subsidiary of a Japanese corporation from the antidiscrimination

benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

23. Complaint at 3-4.

24. Brief for Petitioner and Cross-Respondent at 14-18. Among the rights contained in the United States-Japan FCN Treaty, article VII(1) gives "nationals and companies" of each party five rights of special importance. First, the article contains a grant of national treatment "with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful judicial entity." United States-Japan FCN Treaty, *supra* note 7, at art. VII(1). Second, United States and Japanese citizens and corporations are permitted "to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business." *Id.* at art. VII(1)(a). Third, these investors also have a right "to organize companies under the general company laws of such other Party and to acquire majority interests in companies of such other Party." *Id.* at art. VII(1)(b). Fourth, the article gives investors of either party the right "to control and manage enterprises which they have established or acquired." *Id.* at art. VII(1)(c). Last, enterprises that are established or acquired by the United States or Japanese investors must be given "treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party." *Id.*

25. Brief for Petitioner and Cross-Respondent at 19-35. Article VIII(1) of the Treaty gives "nationals and companies" of the United States and Japan the right to hire "accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." Under this article "accountants and other technical experts" may be hired regardless of their qualifications to practice their profession in the host country if they are employed only for the limited purpose of making examinations, audits, and technical investigations exclusively for companies of their home country. This limitation, however, does not apply to the functions of "executive personnel, attorneys, agents and other specialists." United States-Japan FCN Treaty, *supra* note 7, at art. VIII(1).

26. Brief for Respondents and Cross-Petitioner at 21-28.

provisions of Title VII. Instead, the court held that since Sumitomo was incorporated in New York it was not a Japanese company within the meaning of the United States-Japan FCN Treaty.²⁷

In reaching its conclusion the district court relied on a number of sources. The court began by examining the specific language of article VIII of the Treaty, but found that it did not define "companies."²⁸ The court then looked to article XXII(3), which states that "[c]ompanies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof."²⁹ The court viewed this place-of-incorporation test as being consistent with traditional rules of corporate law.³⁰

The district court supported its interpretation by referring to two other cases that analyzed a subsidiary's nationality for purposes of coverage under the United States-Japan FCN Treaty. In *United States v. R.P. Oldham Co.*³¹ the district court looked to article XXII(3) in the context of a criminal action against the American subsidiary of a Japanese corporation for conspiracy in restraint of interstate and foreign commerce. The American subsidiary argued that it was a company of Japan for purposes of the United States-Japan FCN Treaty and that the Treaty provided the only remedy in an antitrust case.³² The court concluded, however, that "a corporation organized under the laws of a given jurisdiction is a creature of that jurisdiction, with no greater rights, privileges or immunities than any other corporation of that jurisdiction."³³ It said that if a subsidiary wants to retain its status as a Japanese corporation while doing business in the United States, it should operate through a branch. "Having chosen instead to gain privileges accorded American corporations by operating through an American subsidiary, it has for most purposes surrendered its Japanese identity with respect to the activities of the subsidiary."³⁴

The district court in *Sumitomo* also relied on *Spiess v. C. Itoh & Co. (America)*,³⁵ decided a few months earlier by a federal district court in Texas. In that case, which concerned facts and a claim similar to *Sumitomo*, the

27. 473 F. Supp. 506, 510 (S.D.N.Y. 1979).

28. *Id.* at 509.

29. Article XXII(3) of the Treaty provides:

As used in the present Treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.

United States-Japan FCN Treaty, *supra* note 7, at art. XXII(3).

30. 473 F. Supp. 506, 509 (S.D.N.Y. 1979).

31. 152 F. Supp. 818 (N.D. Cal. 1957).

32. *Id.* at 822-23.

33. *Id.* at 823.

34. *Id.*

35. 469 F. Supp. 1 (S.D. Tex. 1979). In *Spiess* three American employees of C. Itoh & Company (America), Inc., a New York corporation wholly owned by a Japanese trading company, brought an action under Title VII alleging that Itoh-America discriminated against its American employees by making managerial positions available only to Japanese nationals. *Id.*

district court stated that, based on the Treaty's own definitional terms, the American subsidiary was a company of the United States for purposes of the interpretation of article VIII. Thus, the court in *Spiess* held that, like other United States companies, Itoh-America was subject to suit on grounds that its employment practices were discriminatory.³⁶

In addition, the district court in *Sumitomo* reviewed a 1978 letter from a deputy legal advisor at the Department of State to the General Counsel of the Equal Employment Opportunity Commission (EEOC). In that letter the Department of State concluded that it saw "no grounds for distinguishing between subsidiaries incorporated in the United States owned and controlled by a Japanese company and those operating as incorporated branches of a Japanese company"³⁷ The court noted, however, that while it was mindful that the meaning given treaties by government departments charged with their negotiation should be given great weight, "in the absence of analysis or reasoning offered by the State Department in support of its position," it rejected the letter in favor of the "treaty's clear definition of corporate nationality."³⁸

Finally, *Sumitomo* argued in its motion to dismiss that it retained its Japanese identity according to the "treaty trader" regulations and guidelines adopted by the Immigration and Nationality Act of 1952.³⁹ Under these regulations the Department of State grants "treaty trader" visas on the basis of the nationality of the majority of stockholders in a corporation rather than its place of incorporation.⁴⁰ Since *Sumitomo* was wholly owned by a Japanese corporation and was considered a Japanese corporation for the purposes of the "treaty trader" regulations, the company contended that it also should be considered a Japanese corporation for purposes of the Treaty. The district court, however, rejected the contention that a determination of corporate nationality under the "treaty trader" regulations was controlling under the United States-Japan FCN Treaty.⁴¹ Instead, it chose the "clear definitional provisions included in Article XXII(3) of the Treaty itself."⁴²

B. Court of Appeals Decision

Despite the agreement between the district courts in *Oldham*, *Spiess*, and *Sumitomo* that a wholly owned American subsidiary of a Japanese corpora-

36. *Id.* at 9.

37. 473 F. Supp. 506, 511 (S.D.N.Y. 1979).

38. *Id.* at 511-12.

39. *Id.* at 512. See 8 U.S.C. § 1101(a)(15)(E) (1976).

40. *Sumitomo* argued that laws and regulations adopted by the United States related to article I of the Treaty, which enable nationals of either the United States or Japan to enter the territory of the other, should determine corporate nationality. 473 F. Supp. 506, 512 (S.D.N.Y. 1979). It relied both on the Immigration and Nationality Act of 1952, which provides for the issuance of visas to nationals to carry on substantive trade between countries pursuant to FCN treaties, and on State Department guidelines that require corporate employers to be organizations that are principally owned by a person or persons having the nationality of the treaty country. See 22 C.F.R. § 41.40 (1982).

41. 473 F. Supp. 506, 512 (S.D.N.Y. 1979).

42. *Id.*

tion is not a company of Japan for purposes of the United States-Japan FCN Treaty, the United States Court of Appeals for the Second Circuit held that a wholly owned subsidiary could invoke the Treaty to the same extent as a Japanese corporation operating in the United States through a branch.⁴³ The court concluded, however, that neither the parent corporation nor its subsidiary were immune from the operation of American labor laws.⁴⁴

The Second Circuit began by rejecting the literal interpretation given article XXII(3) by the district court. Instead, it offered three reasons for holding that subsidiaries are included within the protection of article VIII of the Treaty. First, the Second Circuit concluded that the approach of the district court overlooked the primary purpose of an FCN treaty. According to the appellate court, the purpose of such a treaty is to protect foreign investment generally and is not limited to foreign investment made through branches.⁴⁵ Second, the court of appeals said that a Japanese company easily could circumvent the district court's narrow construction of article XXII(3) by transforming its wholly owned subsidiary into a branch.⁴⁶ Last, the court stated that since articles VI(4), VII(1), and VII(4) of the Treaty grant subsidiaries explicit protection and rights, to exclude them from rights under article VIII would result in a "crazy-quilt pattern."⁴⁷ Thus, the Second Circuit concluded that article XXII(3) defines a company's nationality for the purpose of recognizing its status as a legal entity but not for the purpose of restricting substantive rights granted elsewhere in the Treaty.⁴⁸

Although the court of appeals held that a subsidiary could invoke the substantive provisions of the Treaty, it said that article VIII did not make the subsidiary immune from the operation of American laws prohibiting employment discrimination.⁴⁹ The court found that the words "of their choice" in article VIII were a reaction to the severe restrictions placed on the employment of noncitizens prevalent in many states and countries at the time of the drafting of the Treaty. Thus, the parties intended the clause merely to exempt companies from local regulations restricting the employment of noncitizens.⁵⁰

Having found subsidiaries subject to American employment discrimination laws, the court of appeals then examined the application of Title VII to Sumitomo. The court reasoned that Title VII should be construed in light of the United States-Japan FCN Treaty so that the company could invoke the BFOQ exemption to employ Japanese nationals in positions in which the employment was reasonably necessary to the successful operation of the

43. 638 F.2d 552, 555-56 (2d Cir. 1981).

44. *Id.* at 558.

45. *Id.* at 556.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 558.

50. *Id.* at 559.

company's business.⁵¹ To take advantage of this exception, the court said that the company must produce evidence of BFOQ elements, including a person's "(1) Japanese linguistic and cultural skills, (2) knowledge of Japanese products, markets, customs and business practices, (3) familiarity with the personnel and workings of the principal or parent enterprise in Japan, and (4) acceptability to those persons with whom the company or branch does business."⁵²

C. Supreme Court Decision

Just as a unanimous court of appeals reversed the district court in *Sumitomo*, a unanimous Supreme Court reversed the Second Circuit.⁵³ Like the district court, the Supreme Court decided the case on the narrow ground that Sumitomo was a company of the United States and, therefore, could not invoke the rights provided in article VIII of the United States-Japan FCN Treaty.⁵⁴ Unlike the court of appeals, the Supreme Court was not required to consider the relationship between article VIII and Title VII.⁵⁵

In reaching its decision the Court interpreted the phrase "[c]ompanies of either Party" in article VIII of the Treaty to apply only to companies of the United States or Japan operating in the other country.⁵⁶ Although Sumitomo claimed to be a company of Japan, an examination of the term "companies" in article XXII(3) convinced the Court that the parties to the Treaty intended the place of incorporation to determine a company's nationality. Since Sumitomo was "'constituted under the applicable laws and regulations' of New York," the Court concluded that it was a company of the United States and not of Japan.⁵⁷

The Supreme Court supported its interpretation of the Treaty by referring to correspondence between the governments of Japan and the United States. Both the Ministry of Foreign Affairs of Japan and the United States Department of State had recently agreed that "a United States corporation, even when wholly owned by a Japanese company is not a company of Japan under the Treaty and is therefore not covered by Article VIII(1)."⁵⁸ The Court stated that while this interpretation of the Treaty by the parties was not conclusive, it was "entitled to great weight."⁵⁹

Finally, the Supreme Court disagreed with the Second Circuit's opinion that a literal reading of the Treaty was inconsistent with the Treaty's purpose.

51. *Id.*

52. *Id.*

53. 102 S. Ct. 2374 (1982).

54. *Id.* at 2378.

55. 638 F.2d 552, 558-59 (2d Cir. 1981).

56. 102 S. Ct. 2374, 2378 (1982).

57. *Id.*

58. *Id.* at 2379.

59. *Id.*

According to the Court, the principal purpose of the United States-Japan FCN Treaty was not to give foreign corporations greater rights than domestic corporations in conducting business, but rather "to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage."⁶⁰ The Court also discounted the Second Circuit's concern that Japanese companies operating directly in the United States through a branch would have greater rights than subsidiaries of Japanese companies incorporated in the United States. The Court believed that an unincorporated branch would enjoy the sole significant advantage of coverage under article VIII, which would be insufficient to contravene the intent of the Treaty.⁶¹

Besides its discussion of the question of corporate nationality, the Supreme Court in *Sumitomo* specifically raised but did not discuss four important issues.⁶² Because these issues will be crucial not only to *Sumitomo*'s defense on remand but also to future employment discrimination cases concerning foreign enterprises in the United States, the remainder of this Article will examine each of these issues.

III. THE INTERPRETATION OF FCN TREATIES AFTER *SUMITOMO*

The Supreme Court in *Sumitomo* limited its holding to the corporate nationality of American subsidiaries under the United States-Japan FCN Treaty. The Court took no position "as to the interpretation of other Friendship, Commerce and Navigation Treaties which, although similarly worded, may have different negotiating histories."⁶³ Because the Court did not make its definition of "companies" applicable to all FCN treaties, other courts may reach different interpretations of the scope of the term. Although the Supreme Court singled out a treaty's negotiating history as a consideration that might influence those results, it is not the only element used in treaty construction. Since courts must provide an authoritative interpretation when a treaty results in litigation, this section will examine some of the criteria available for that purpose and their implications for FCN treaties.

The starting point for a court required to interpret any treaty is the statements of the Supreme Court and commentators concerning the basic function of treaty construction. The Supreme Court has held that treaties are to be construed "according to the intention of the contracting parties, and so as to carry out their manifest purpose."⁶⁴ This view is reflected in section 146 of the *Restatement (Second), Foreign Relations Law of the United States*,

60. *Id.* at 2381.

61. *Id.* at 2382.

62. *Id.* n.19.

63. *Id.* at 2380 n.12.

64. *Wright v. Henkel*, 190 U.S. 40, 57 (1903). See also the statements of the courts in *Bush v. United States*, 71 F.2d 635 (5th Cir. 1934); *American Trust Co. v. Smyth*, 247 F.2d 149 (9th Cir. 1957); *Board of County Comm'rs v. Aerolineas Peruanas*, 307 F.2d 802 (5th Cir. 1962); *United States v. A.L. Burbank & Co.*, 525 F.2d 9 (2d Cir. 1975).

which provides in part that "[t]he primary object of interpretation is to ascertain the meaning intended by the parties for the terms in which the agreement is expressed, having regard to the context in which they occur and the circumstances under which the agreement was made."⁶⁵

Although these statements do not specify how a court should approach a specific problem of treaty construction, the *Restatement* lists a number of elements a court may consider "by way of guidance in the interpretative process."⁶⁶ In keeping with the current trend, however, the *Restatement* emphasizes that "[t]here is no established priority" among the criteria it sets out, nor is the list meant to be exclusive.⁶⁷ Those criteria can be divided into three broad groups.

A. *Language of the Treaty*

Although American courts consistently have rejected a literal approach to treaty interpretation,⁶⁸ they agree that "the language [of a treaty article] must be the logical starting point"⁶⁹ in interpreting a treaty. The *Restatement* reflects this view, stating that the meaning of a treaty provision should be determined from the "ordinary meaning" of the words in their context.⁷⁰ This rule includes the text of the article at issue, the title of the treaty, and any statement of purpose contained elsewhere in it.⁷¹

In approaching the language of a treaty, the Supreme Court has followed a policy of liberal construction whenever possible.⁷² The statements of the Supreme Court in *Asakura v. City of Seattle*,⁷³ a case concerning the 1911 Treaty of Commerce and Navigation between the United States and Japan,⁷⁴ illustrate this canon of construction. In *Asakura* the plaintiff, a citizen of Japan, was a Seattle pawnbroker. A city ordinance made it unlawful to engage in that business without a license, which only citizens of the United States could obtain. The plaintiff contended that the ordinance violated the Treaty, which provided that citizens of each country had the right to reside in the other country and "to carry on trade, wholesale and retail, . . . and general-

65. RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES § 146 (1965) [hereinafter cited as RESTATEMENT].

66. *Id.* § 147(1).

67. *Id.* § 147(2).

68. "It is a canon of interpretation to so construe a law or a treaty as to give effect to the object designed, and for that purpose all of its provisions must be examined in the light of the attendant and surrounding circumstances." *In re Ross*, 140 U.S. 453, 475 (1891). See also *Sullivan v. Kidd*, 254 U.S. 433 (1921).

69. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 33 (2d Cir. 1975).

70. RESTATEMENT, *supra* note 65, § 147(1)(a).

71. *Id.* § 147(1)(b).

72. The Supreme Court first articulated this policy in *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242 (1830). Since then it has been reaffirmed by the Supreme Court in *Hauenstein v. Lynham*, 100 U.S. 483 (1879); *Geofroy v. Riggs*, 133 U.S. 258 (1890); *In re Ross*, 140 U.S. 453 (1891); *Tucker v. Alexandroff*, 183 U.S. 424 (1902); *Asakura v. City of Seattle*, 265 U.S. 332 (1924); *Jordan v. Tashiro*, 278 U.S. 123 (1928); and *Factor v. Laubenheimer*, 290 U.S. 276 (1933).

73. 265 U.S. 332 (1924).

74. 37 Stat. 1504, T.S. No. 558.

ly to do anything incident to or necessary for trade upon the same terms as native citizens.'"⁷⁵

In deciding that the business of a pawnbroker was a trade within the meaning of the Treaty, the Court began by looking to the intention of the parties, which it said, without support, was to strengthen relations between the United States and Japan by providing for equality between citizens of the two countries.⁷⁶ The Court then turned to the words of the Treaty itself and restated its long held position that "[t]reaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred."⁷⁷ Although the scope of the phrase "to carry on trade" was not clear, the Court held that, given the purpose of the Treaty, all United States and Japanese citizens should have the right to engage in every type of business that reasonably fell under the term "trade."⁷⁸

Asakura and *Sumitomo* illustrate a major limitation in relying on the language of a treaty. In both cases it was not possible for the courts to determine the "ordinary meaning" of the term in the treaty until they had decided on the intention of the parties. In *Sumitomo* the court of appeals and the Supreme Court defined that intention differently. The Second Circuit viewed the purpose of the Treaty as the protection of foreign investment generally, rather than of foreign investment made through branches.⁷⁹ The appellate court thus rejected a literal reading of the term "companies" that it believed disregarded "substance for form" and failed to consider the nature of the agreement.⁸⁰ Consistent with the broad purpose, the court was able to give the term "companies" a liberal interpretation. The Supreme Court, on the other hand, saw a more limited purpose in the Treaty. According to the Court, it was designed to assure foreign corporations the right to conduct business equally with American firms without suffering discrimination.⁸¹ This interpretation did not require the inclusion of domestically incorporated subsidiaries within the protection of the treaty.

These cases indicate that while the language of a treaty is a necessary first step in treaty interpretation, only in exceptional cases will it be clear enough to determine the meaning without looking to other sources.

B. *Negotiating History of the Treaty*

Because of the liberal-construction approach to treaty interpretation, courts are willing to look beyond the words of the treaty itself to the historical

75. 265 U.S. 332, 340 (1924).

76. *Id.* at 341.

77. *Id.* at 342.

78. *Id.* at 342-43.

79. 638 F.2d 552, 556 (2d Cir. 1981).

80. *Id.*

81. 102 S. Ct. 2374, 2381 (1982).

context in which the treaty was made.⁸² Section 147 of the *Restatement* lists three criteria that may be considered in reviewing the negotiating history:

- c. the circumstances attending the negotiation of the agreement;
- d. drafts and other documents submitted for consideration, action taken on them, and the official record of the deliberations during the course of the negotiation;
- e. unilateral statements of understanding made by a signatory before the agreement came into effect, to the extent that they were communicated to, or otherwise known to, the other signatory or signatories.⁸³

Two difficulties attend the use of a treaty's negotiating history as a source for determining the meaning and intention of the parties. First, the history of the negotiations may be incomplete or unavailable. In *Sumitomo* and *Spiess* none of the courts had the benefit of a full discussion of the negotiating history. Instead, they were limited to conflicting unilateral statements made by United States negotiators.⁸⁴ Since recourse to this material failed to reveal the clear intention of the parties regarding the corporate nationality of subsidiaries for purposes of article VIII of the Treaty, both sides were able to find some support for their interpretations. It is thus difficult for a court to determine what weight it should give to either side.

The second difficulty with looking to the negotiating history is that if FCN treaties have different negotiating histories, identical language may be given differing interpretations by the courts. An example of this possibility is the United States-Netherlands FCN Treaty.⁸⁵ In 1955 the United States negotiated an FCN treaty with the Netherlands similar to the Treaty with Japan.

82. "It has often been said that when the meaning of a treaty is not clear, recourse may be had to the negotiations, preparatory works, and diplomatic correspondence of the contracting parties to establish its meaning." *Arizona v. California*, 292 U.S. 341, 359-60 (1934). See also *Arizona v. California*, 373 U.S. 546 (1963); *United States v. Texas*, 339 U.S. 707 (1950); *Cook v. United States*, 288 U.S. 102 (1933); *Maugnie v. Compagnie Nationale Air France*, 549 F.2d 1256 (9th Cir. 1977); *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967).

83. *RESTATEMENT*, *supra* note 65, § 147(1)(c)-(e).

84. During the negotiations the Japanese negotiators requested an explanation of the meaning of article XXII(3) from the United States negotiators. Jules Bassin, the legal attaché to the United States Embassy in Tokyo at the time, explained that the purpose of the article was to clarify what was meant by the word "company." Bassin stated that article XXII(3) was intended to mean only recognition of the existence of a juridical entity. It was not intended to limit Treaty rights. Memorandum of Conversation, Dispatch No. 13, April 8, 1952, prepared by the Office of the United States Political Advisor, Tokyo, Japan, *cited in* Brief for C. Itoh & Company (America), Inc. Appendix 1, *Spiess v. C. Itoh & Co. (Am.)*, 643 F.2d 353 (5th Cir. 1981). During the Treaty negotiations Secretary of State Dean Acheson considered the meaning of the term "companies" in an airgram to the American Embassy in Tokyo. This airgram, sent during the final stages of the Treaty negotiations, was apparently a response to an inquiry about what would happen if citizens of a third country, which had refused to enter into a treaty of friendship, commerce, and navigation with Japan, sought to gain Treaty rights by incorporating in the United States and then claiming privileges under the Treaty. The airgram explained that the problem was resolved by article XXI(1), which allowed the host country to pierce the corporate veil under those circumstances. The airgram then concluded with the following analysis: "Article XXII, paragraph 3, . . . establishes that whether or not a juridical entity is a company of either party for treaty purposes is determined solely by the place of incorporation. Such factors as the location of the principal place of business or the nationality of the major stockholders are disregarded." See Brief for Plaintiffs-Appellees at 16-17, *Avigliano v. Sumitomo Shoji Am., Inc.*, 638 F.2d 552 (2d Cir. 1981).

85. Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942.

During the negotiations the Dutch negotiators expressed concern that the proposed language of article VIII of the Treaty, which was identical with that in article VIII of the United States-Japan FCN Treaty, would be read as not conferring equal benefits on branches and subsidiaries. They feared that the Treaty would exclude locally incorporated subsidiaries from all substantive benefits conferred on "companies of either Party." Department of State negotiators explained that this result was not the purpose of the article and offered to insert a clarifying phrase to that effect.

[T]he legal adviser's formulation of the proviso to be inserted in Article XXIII paragraph 3, was *not* calculated to detract in any way from the rights and privileges "a controlled company" would otherwise enjoy. . . . The effect of the legal adviser's formulation was to assure that the "controlled company" will always, as a minimum, get everything that the parent company gets as a matter of treaty *right*—but was not calculated to detract from any additional privileges that the "controlled company" may actually have. . . . The Department has the same interest . . . in avoiding damage to the position of "controlled companies," because Americans have "controlled companies" abroad just as the Dutch have them in the U.S.⁸⁶

After extensive discussions on the issue, the Dutch negotiators concluded that inclusion of a provision in the Treaty explicitly conferring parent rights on subsidiaries was unnecessary. In a letter to the United States Embassy, the Dutch negotiator stated:

[N]obody would deny a company controlled by the nationals of companies of one of the contracting Parties the treatment, which is accorded to the parent company, except perhaps in a very special case e.g. taxation. . . . As the principle is generally accepted, I think it would be superfluous to spell it out.⁸⁷

The statements of the American and Dutch negotiators were aimed directly at the question whether subsidiaries would have the same rights under the Treaty as their parent corporations. Because of the clear negotiating history, a court looking at the legislative history of the United States-Netherlands FCN Treaty probably would come to a conclusion opposite the one reached by the Supreme Court in *Sumitomo*. These two difficulties have led many courts to broaden their inquiry from the language of the text and its negotiating history to the subsequent practice of the parties under the treaty.

C. Subsequent Practice and Statements

When the legislative history of a treaty is incomplete or unavailable, the conduct and statements of the parties subsequent to ratification may be im-

86. Letter from the Counselor for Economic Affairs, U.S. Embassy, the Netherlands, to the Department of State (Treaty Agreements and Treaty Division) (Oct. 28, 1955), *reprinted in* Appendix to Reply Brief for the Defendant-Appellant Sumitomo Shoji America, Inc. at 339a-340a, *Avigliano v. Sumitomo Shoji Am., Inc.*, 638 F.2d 552 (2d Cir. 1981) (emphasis in original).

87. Letter from the Netherlands negotiator to the Economic Counselor, U.S. Embassy, the Netherlands (Nov. 11, 1955), *reprinted in* Appendix to Reply Brief for the Defendant-Appellant Sumitomo Shoji America, Inc. at 353a.

portant in determining the meaning of a particular treaty provision. This evidence is allowed so that the court can "give the specific words of a treaty a meaning consistent with the genuine shared expectations of the contracting parties."⁸⁸ These expectations can change as conditions arise that were unanticipated at the time of drafting.

Despite statements that the "subsequent action of the parties"⁸⁹ and their "subsequent practice"⁹⁰ may be considered in determining a treaty's construction, no cases have been found in which a court explicitly referred to and applied these considerations. Two reasons for this are possible. First, no evidence may exist on what the government's practice actually has been. In *Sumitomo*, for example, neither party was able to make any showing that the United States had taken any action since the signing of its FCN treaty with Japan indicating whether it considered a subsidiary of a Japanese corporation to be a company of Japan or of the United States. Second, like the negotiating history of a treaty, the record of the United States' practice may be incomplete or unavailable.⁹¹

While subsequent practice may be inconclusive regarding the meaning of a treaty provision, the subsequent statements of the governments may provide some indication of their understanding of the treaty. This consideration raises a question of how much weight should be given to these statements. Although the courts have the exclusive right to interpret treaties in litigation,⁹² in practice they give great weight to an interpretation of an agreement by the executive branch.⁹³ A major problem with determining what weight should be given to the statements of the parties can arise, however, when there is disagreement between the governments or conflicting statements by one government. This situation exists in the United States-Japan FCN Treaty.

In the summer of 1975 a disagreement developed in Japan between the Japanese Ministry of Foreign Affairs and the United States Embassy over the interpretation of the term "companies." The Ministry of Foreign Affairs took the position that an American-owned company incorporated in Japan was a Japanese company and thus was excluded from Treaty benefits. The United States Embassy, however, argued that the nationality of a subsidiary was

88. *Maximov v. United States*, 299 F.2d 565, 568 (2d Cir. 1962), *aff'd*, 373 U.S. 49 (1963).

89. *Husserl v. Swiss Air Transp. Co.*, 351 F. Supp. 702, 707 (S.D.N.Y. 1972).

90. RESTATEMENT, *supra* note 65, § 147(1)(f), provides that "the subsequent practice of the parties in the performance of the agreement, or the subsequent practice of one party, if the other party or parties knew or had reason to know of it," may be considered in the interpretative process. *Id.*

91. Although the United States publishes a digest of its international practice containing diplomatic notes and other statements reflecting treaty interpretation, it is not completely up to date. See DIGEST OF INTERNATIONAL LAW (M. Whiteman ed. 1963-1973); U.S. DEPT OF STATE, THE PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES.

92. RESTATEMENT, *supra* note 65, § 150, provides: "Under the law of the United States, courts in the United States have exclusive authority to interpret an international agreement to which the United States is a party for the purpose of applying it in litigation as the domestic law of the United States." *Id.*

93. See Chief Justice Burger's statement in *Sumitomo*, 102 S. Ct. 2374, 2379 (1982). See also the statements in *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961); *Shafter v. United States*, 273 F. Supp. 152, 158 (S.D.N.Y. 1967).

determined by the nationality of a majority of the stockholders.⁹⁴ To resolve the dispute, the Embassy requested guidance from the Department of State. In reply, Secretary of State Henry Kissinger cabled the Embassy that while a company's status and nationality were determined by the place of establishment, it did not determine the company's substantive rights.⁹⁵ According to Kissinger, the substantive rights of an American-owned company in Japan arose from the FCN Treaty, which made it irrelevant that the nationality of a company is determined by the place of establishment.⁹⁶

Conflicting interpretations of the term "companies" within the United States government can be found in two letters written by the Department of State in 1977 and 1978. Shortly after suit was filed in *Sumitomo*, the General Counsel of the EEOC wrote to the Department of State requesting its interpretation of certain aspects of the United States-Japan FCN Treaty.⁹⁷ Specifically, the EEOC inquired whether the Treaty permitted subsidiaries incorporated in the United States to fill their managerial positions with Japanese nationals admitted as "treaty traders."⁹⁸ In reply, a deputy legal advisor wrote that the Department of State drew no distinction "between subsidiaries incorporated in the United States owned and controlled by a Japanese company and those operating as unincorporated branches of a Japanese company."⁹⁹ Almost a year after that letter, however, another deputy legal advisor at the Department of State wrote a second letter to the EEOC reversing the earlier position on the rights of subsidiaries under the Treaty.¹⁰⁰ In that letter the legal advisor stated that "it was not the intent of the negotiators to cover locally-incorporated subsidiaries, . . . therefore U.S. subsidiaries of Japanese corporations cannot avail themselves of this provision of the treaty."¹⁰¹

The statements of the Department of State since the signing of the United States-Japan FCN Treaty do not reveal a clear position whether foreign-owned subsidiaries are included within the protection of the Treaty. One solution to this problem is for the court to require bilateral agreement rather than unilateral statements. The Supreme Court took this position in *Sumitomo* after both governments submitted letters stating that they did not intend to include subsidiaries under the Treaty.¹⁰² The Court held that

94. Brief for C. Itoh & Company (America), Inc. at 14-15, *Spiess v. C. Itoh & Co. (Am.)*, 643 F.2d 353 (5th Cir. 1981).

95. *Id.* at 15-17.

96. *Id.*

97. See Letter from Lee R. Marks, Deputy Legal Advisor, Department of State, to Abner W. Sibal, General Counsel, EEOC (Oct. 17, 1978), *reprinted in* 73 AM. J. INT'L L. 281, 282-84 (1979) [hereinafter cited as Marks letter].

98. See *supra* note 39.

99. Marks letter, *supra* note 97, at 281.

100. Letter from James R. Atwood, Deputy Legal Advisor, Department of State, to EEOC (Sept. 11, 1979), *reprinted in* 74 AM. J. INT'L L. 158-59 (1980).

101. *Id.*

102. 102 S. Ct. 2374, 2380 (1982).

“[w]hen the parties to a treaty both agree as to the meaning of the treaty position, and that interpretation follows from clear treaty language, we must, absent extraordinarily strong language, defer to that interpretation.”¹⁰³ The only limitation of this position is that it may not be possible to get the parties to agree on how they interpret a particular provision.¹⁰⁴

The prospect that substantially similar language in treaties may receive different interpretations has not troubled the courts. For example, the courts have traditionally been willing to accept inconsistent interpretations of extradition treaty provisions.¹⁰⁵ The reason for this acceptance lies in the emphasis placed on the intention of the parties in treaty construction. The courts perceive that the historical, political, and economic conditions at the time of negotiation or practice may require the government to take positions on the meaning of a particular treaty section that differ depending on the country involved. This practical consideration was recognized by the Supreme Court in *Sumitomo*¹⁰⁶ and will be a guide in the interpretation of other FCN treaties.

IV. AMERICAN SUBSIDIARIES AND THE FCN TREATY RIGHTS OF THEIR FOREIGN PARENT CORPORATIONS

At the conclusion of its opinion in *Sumitomo*, the Supreme Court noted in a footnote that “[w]e . . . express no view as to whether Sumitomo may assert any Article VIII(1) rights of its parent.”¹⁰⁷ Although the Court held that Sumitomo did not have rights directly under the United States-Japan FCN Treaty, it left open the possibility that on remand the subsidiary could rely on the rights of its Japanese parent for its own defense. In addition, the Court’s footnote raises the broader question whether in future cases American subsidiaries may assert the rights of their foreign parent corporations arising from other FCN treaties. This section will explore some of the implications of the Court’s statement.

For a subsidiary to assert successfully the “of their choice” treaty rights of its foreign parent, it must persuade the court that the personnel policies and practices at issue are really those of the parent. This may be done in two ways. First, the subsidiary could argue that the parent and the subsidiary are a single employer or that the subsidiary is merely an agent of the parent, analyses similar to those upheld in some employment discrimination cases. Although many plaintiffs have successfully relied on this approach to overcome

103. *Id.*

104. This was illustrated during the *Sumitomo* case by the Danish government, which officially aligned itself in support of Sumitomo’s position. See Statement of the Danish Government Concerning the Interpretation of the Treaty of Friendship, Commerce and Navigation between the Kingdom of Denmark and the United States of America, signed on 1 October 1951, reprinted in Brief Amicus Curiae for the East Asiatic Co., Ltd. et al. in Support of Petitioner Sumitomo Shoji America, Inc. at 31a-32a, *Sumitomo Shoji Am., Inc. v. Avagliano*, 102 S. Ct. 2374 (1982).

105. For a detailed discussion of extradition treaties and their interpretation by courts in the United States, see M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER (1974).

106. 102 S. Ct. 2374, 2377 (1982).

107. *Id.* at 2382 n.19.

obstacles to discrimination suits, it has not yet been used as a defense by subsidiaries. There is no reason a subsidiary could not raise the defense when a court is asked to consider its employment practices under treaty rights and Title VII. Second, because of the relationship between the parent and the subsidiary, the subsidiary could argue that the parent has rights applicable to the case and that the subsidiary has third-party standing to raise them.

A. *The Parent-Subsidiary Relationship*

In employment discrimination suits the courts have recognized that a mere parent-subsidiary relationship is insufficient to hold the parent liable for the discriminatory practices of the subsidiary. In *Workman v. Ravenna Arsenal, Inc.*,¹⁰⁸ a Title VII suit alleging racial discrimination, the district court held that before the parent can be liable for the subsidiary's acts the facts must indicate an exercise of "dominion and control" by the parent over the subsidiary.¹⁰⁹ Although the courts have differed about the amount of control necessary to meet this requirement, they have dealt with the issue by utilizing two tests.

1. *Integrated-Enterprise Theory*

Under the integrated-enterprise theory, separate corporations may be aggregated if the activities and management of the parent corporation and its subsidiary are so closely related that they should be treated as a "single employer."¹¹⁰

The National Labor Relations Board (NLRB) first developed the integrated-enterprise theory to deal with jurisdictional problems.¹¹¹ The NLRB contends, with the Supreme Court's approval,¹¹² that the controlling criteria for determining whether nominally separate business entities should be treated as a single employer are "interrelation of operations, common management, centralized control of labor relations and common ownership."¹¹³ This test later was adopted by courts in Title VII¹¹⁴ and Age Dis-

108. 6 Fair Empl. Prac. Cas. (BNA) 149 (N.D. Ohio 1973).

109. *Id.* at 152.

110. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 847-48 (1976).

111. For a detailed discussion of the use of the single-employer doctrine by the NLRB, see IBA T. KHEEL, BUSINESS ORGANIZATIONS § 8.02[4][b] (1981).

112. *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965).

113. *Id.* See also *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1042 (8th Cir. 1976); *Marine Welding & Repair Work, Inc. v. NLRB*, 439 F.2d 395, 397 (8th Cir. 1971); *NLRB v. Aircraft Eng'g Corp.*, 419 F.2d 1303, 1303 (8th Cir. 1970). The Fifth Circuit recently discussed the uses of the single-employer doctrine in the labor relations area in *Carpenters Local 1846 v. Pratt-Farnsworth, Inc.*, 95 Lab. Cas. (CCH) ¶13,877, at 22,635-36 (5th Cir. 1982), *aff'g in part and rev'g in part* 94 Lab. Cas. (CCH) ¶13,564 (E.D. La. 1981).

114. See *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 337 (7th Cir. 1974); *EEOC v. Upjohn Corp.*, 445 F. Supp. 635, 638 (N.D. Ga. 1977); *Black Musicians v. Local 60-471*, 375 F. Supp. 902, 903 (W.D. Pa. 1974); *Williams v. New Orleans S.S. Assoc.*, 341 F. Supp. 613, 616 (E.D. La. 1972); *United States v. Jacksonville Terminal Co.*, 351 F. Supp. 452, 454 (M.D. Fla. 1972).

crimination in Employment Act (ADEA)¹¹⁵ cases. Although these claims arose in the context of a plaintiff's seeking to join corporations as defendants, the analysis of the courts is arguably applicable to situations like *Sumitomo*, in which a defendant subsidiary alleges control by its parent.

The need to treat separate corporations as a single employer initially arose from the definition of an "employer" in Title VII and the ADEA.¹¹⁶ When the immediate employer had too few employees to be covered by the Acts, the plaintiffs sought to bring their actions against parent corporations,¹¹⁷ associations of employers,¹¹⁸ and related corporations.¹¹⁹ These cases forced the courts to consider the relationship between the corporations to determine who was the employer of the plaintiff and to consider the degree of control necessary to make the determination. Some of the decisions based the aggregation of multiple entities on the "interrelationship of operations" and the "common management" aspects of the NLRB test.¹²⁰ Others, however, required that the parent control the subsidiary's employment policies and terms and conditions of employment and that the two corporations have common employees.¹²¹

In applying the integrated-enterprise theory to an American subsidiary of a foreign corporation in a Title VII action, it is necessary to consider the manner in which the subsidiary is controlled. In *Spiess*, for example, Itoh-America was a wholly owned subsidiary of a Japanese trading company and was concerned almost exclusively with the import and export of goods between the United States and Japan. Because of the close relationship between Itoh-America and its Japanese parent corporation, Itoh-Japan, it has been noted that

[t]he relationship between Itoh (America) and Itoh (Japan) is that of a subordinate/superior. Decisions regarding management staff, particularly top management and

115. 29 U.S.C. §§ 621-634 (1976). The test of corporate identity applied in Title VII cases is equally appropriate in suits brought under the ADEA. The Supreme Court has held that the ADEA and Title VII should be construed similarly because of their common language and purpose. See *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979). ADEA cases applying the integrated-enterprise theory include *Brennan v. Ace Hardware Corp.*, 368 F.2d 368 (8th Cir. 1974), and *Marshall v. Arlene Knitwear, Inc.*, 454 F. Supp. 715 (E.D.N.Y. 1978).

116. Title VII defines "employer" as a "person" who has "fifteen or more employees for each working day of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b) (1976). Under the ADEA an "employer" is a person who has twenty or more employees for each working day of twenty or more calendar weeks in the current or preceding year. 29 U.S.C. § 630(b) (1976).

117. See, e.g., *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389 (8th Cir. 1977).

118. See, e.g., *Williams v. New Orleans S.S. Assoc.*, 341 F. Supp. 613 (E.D. La. 1972).

119. See, e.g., *Marshall v. Arlene Knitwear, Inc.*, 454 F. Supp. 715 (E.D.N.Y. 1978).

120. In *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 392 (8th Cir. 1977), the court held that the sharing of management and ownership and the interrelationship of operations between two companies required their consolidation as a single employer even though the evidence on control of labor relations was not clearly established. See also *Odriozola v. Superior Cosmetics Distribs.*, 29 Fair Empl. Prac. Cas. (BNA) 503 (D.P.R. Feb. 5, 1982).

121. In *Williams v. New Orleans S.S. Assoc.*, 341 F. Supp. 613 (E.D. La. 1972), the plaintiff brought a racial discrimination action against an association of employers. Although a dozen of the member companies did not have the requisite number of employees under Title VII, the court treated the association as a single employer. Central to the criteria the court considered in making this determination were the association's control of employment and its establishment of uniform employment policies and practices applicable to all member companies. *Id.*

for Japan staff almost exclusively, rests largely with Itoh (Japan). In choosing an executive vice-president to serve as "the right hand or left hand" of the president of Itoh (America), the board of directors has authority, theoretically, to approve a candidate. In reality, the candidate is selected by and sent from Itoh (Japan).¹²²

If the foreign parent takes no active role in the business and personnel decisions of its American subsidiary, the parent and the subsidiary cannot be considered an integrated enterprise. In situations like *Spiess* and *Sumitomo*, however, the foreign corporation is more than a passive parent. Cases in which the parent regularly participates in the business decisions of the subsidiary and leaves little if any discretion to the subsidiary to make decisions about senior managerial positions support the argument that the parent's and not the subsidiary's personnel policies are at issue.

2. Agency

The second basis on which to establish the responsibility of a parent corporation for the acts of its subsidiary concerns the issue whether "the parent corporation so controls the subsidiary that the subsidiary is merely the agent or instrumentality of the parent."¹²³ Title VII prohibits discrimination by an employer "and any agent of such a person."¹²⁴ Under this definition, if it can be shown that the subsidiary operated as an agent of the foreign parent, the liability for the discriminatory practices becomes the responsibility of both the parent as the employer and the subsidiary as its agent. The defenses of the parent, then, should also be available to the subsidiary.

In *Hassell v. Harmon Foods, Inc.*,¹²⁵ an action brought by an employee against his immediate employer and its parent corporation, the district court refused to treat the two corporations as one for the purposes of the definition of an employer in Title VII. The court granted the parent's motion to dismiss the action against it after examining the relationship between the parent and the subsidiary. First, the court found that the "relation between the parent corporation and the subsidiary is a normal one and the subsidiary could in no way be called a 'sham.'"¹²⁶ Second, the court did not find any indication that the parent corporation took any part in the subsidiary's employment decisions.¹²⁷ Last, the court said that the affairs of the parent and subsidiary were handled separately.¹²⁸

122. Sethi & Swanson, *Are Foreign Multinationals Violating U.S. Civil Rights Laws?*, 4 EMPLOYEE REL. L.J. 485, 497-99 (1979).

123. *Woodford v. Kinney Shoe Corp.*, 369 F. Supp. 911, 916 (N.D. Ga. 1973). See also *Mas Marques v. Digital Equip. Corp.*, 637 F.2d 24, 26-27 (1st Cir. 1980); *Fike v. Gold Kist, Inc.*, 514 F. Supp. 722, 725-26 (N.D. Ala. 1981); *Linskey v. Heidelberg E., Inc.*, 470 F. Supp. 1181, 1184 (E.D.N.Y. 1979).

124. 42 U.S.C. § 2000(e)(b) (1976).

125. 336 F. Supp. 432 (W.D. Tenn. 1971).

126. *Id.* at 433.

127. *Id.*

128. *Id.* See also *EEOC v. Cuzzens of Ga.*, 15 Fair Empl. Prac. Cas. (BNA) 1807 (N.D. Ga. 1977); *Lottice v. Ingersoll-Rand Co.*, 14 Fair Empl. Prac. Cas. (BNA) 708 (N.D. Cal. 1977).

The analysis used by the court in *Hassell* is similar to the piercing-of-the-corporate-veil doctrine in corporate law.¹²⁹ Only if two corporations are not separate, in law and in fact, is the subsidiary considered the agent or instrumentality of the parent. In applying this test to Sumitomo and other American subsidiaries of foreign corporations, courts will consider a number of criteria. From the subsidiary's point of view, the control of the parent over the subsidiary will be critical, particularly in personnel matters. If the parent has the power to appoint and does appoint senior managerial staff, it appears to meet the agency test.

Little substantive difference exists between the integrated-enterprise and agency tests. Under each test the court determines the degree of interrelation between the parent corporation and the subsidiary in the control of personnel policies. When the parent and the subsidiary have acted jointly, or when the subsidiary has acted as an extension of the parent, the court may disregard the parent's separate corporate existence.

B. Third-Party Standing

The issue of standing usually arises when a plaintiff seeks to bring an action to redress an alleged or threatened injury.¹³⁰ Occasionally, however, the issue emerges when a litigant asserts the rights of a third party either as a basis for the action or as a bar to judgment against it.¹³¹ Ordinarily the courts are hesitant to allow a litigant to base a claim or a defense on the rights of a person not before the court.¹³² The reasons for this reluctance lie not only in the constitutional requirements for standing of a "case" or "controversy,"¹³³ but also in the rules of "judicial self-governance" developed by the Supreme Court.¹³⁴ In *Singleton v. Wulff*¹³⁵ Justice Blackmun offered two reasons for what he termed these "prudential" limitations:

First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be

129. See, e.g., *CM Corp. v. Oberer Dev. Co.*, 631 F.2d 536 (7th Cir. 1980).

130. See generally *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970); *Flast v. Cohen*, 392 U.S. 83 (1968); *Baker v. Carr*, 369 U.S. 186 (1962). See also Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973).

131. See *Warth v. Seldin*, 422 U.S. 490 (1975); *Roe v. Wade*, 410 U.S. 113 (1973). See also Rohr, *Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts*, 35 U. MIAMI L. REV. 393 (1981); Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962); Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974).

132. See *Barrows v. Jackson*, 346 U.S. 249 (1953), in which the Supreme Court repeated its position that "one may not claim standing . . . to vindicate the constitutional rights of some third party." *Id.* at 255.

133. U.S. CONST. art. III, § 2.

134. In *Warth v. Seldin*, 422 U.S. 490 (1975), the Court stated that [w]ithout such limitations—closely related to art. III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even judicial intervention may be unnecessary to protect individual rights.

Id. at 500.

135. 428 U.S. 106 (1976).

able to enjoy them regardless of whether the in-court litigant is successful or not. . . . Second, third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. The holders of the rights may have a like preference, to the extent they will be bound by the court's decisions under the doctrine of *stare decisis*.¹³⁶

Despite the constitutional and self-imposed restrictions, the courts sometimes have given litigants standing to raise the rights of third parties. These exceptions have centered on three considerations: first, the relationship between the litigant and the third party; second, the ability of the third party to assert effectively his own rights; and last, the risk that the rights of third parties will be impaired if third-party standing is not permitted.

Most cases of third-party standing during the past decade have concerned plaintiffs' asserting the rights of third persons as the basis of their actions.¹³⁷ The Supreme Court has also considered a number of cases of defendants' standing. While the earlier cases in this area looked to the relationship between the litigant and the third party and the ability of the third party to intervene, recent cases have shifted toward an emphasis on the impairment of the rights of the third party as the principal test.

In *Griswold v. Connecticut*¹³⁸ the Supreme Court focused on the relationship test to determine standing. In that case a physician was convicted of violating a state law that prohibited giving birth control information to married couples.¹³⁹ The Court permitted the physician to raise in his defense the constitutional right to "marital privacy" of couples who were not parties to the action, because of the "professional relationship" between a physician and his patient.¹⁴⁰

In *Barrows v. Jackson*,¹⁴¹ however, the Court looked only to whether the third party would be able to assert his own rights. Barrows sued Jackson, a white landowner, for selling land in breach of a racially restrictive covenant. The landowner argued that enforcement of the covenant would violate the right of potential nonwhite purchasers to equal protection.¹⁴² Although the landowner was not a member of that class and had no relationship with it, the

136. *Id.* at 113-14.

137. Physicians have brought a number of suits challenging state restrictions on abortions and alleging that the statutes violated the constitutional rights of a class of third persons to an abortion. *See* *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Singleton v. Wulff*, 428 U.S. 106 (1976); *Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973). In none of the cases, however, did the physician assert that he was a member of the class. In holding that the physicians had the requisite standing to challenge the laws, the Supreme Court looked to the relationship between the physician and the patient, the member of the class. *Singleton*, 428 U.S. 106, 114-15 (1976). In addition, the Court closely examined whether the third person could intervene and concluded that in many cases the desire for anonymity or the potential for mootness due to delay made intervention impossible. *Id.* at 117.

138. 381 U.S. 479 (1965).

139. *Id.* at 480.

140. *Id.* at 481.

141. 346 U.S. 249 (1953).

142. *Id.* at 251-52.

Supreme Court said that if he did not raise those rights "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court."¹⁴³

In *NAACP v. Alabama*¹⁴⁴ the issues of both relationship and ability to intervene were before the Court. The State sued to enjoin the NAACP from operating in Alabama because it had not registered. Although the NAACP had complied with an order to produce certain records, it refused to release its membership list and was held in contempt. In its defense the NAACP asserted the constitutional rights of its members to freedom of association and privacy.¹⁴⁵ The Supreme Court held that, because the NAACP and its members were "in every practical sense identical,"¹⁴⁶ the relationship was sufficient for the association to act as the members' representative.¹⁴⁷ In addition, the Court said that to require the individual members of the NAACP to intervene to prevent disclosure of their connection with the association "would result in the nullification of the right at the very moment of its assertion."¹⁴⁸

In recent years the Court, in a number of third-party standing cases, has shifted its attention to the effect on the rights of the third parties if standing were not granted. In *Eisenstadt v. Baird*¹⁴⁹ a distributor of contraceptives was convicted of violating a state law prohibiting their distribution to unmarried persons. Since the defendant sought to raise the right of unmarried persons to obtain contraceptives, the Supreme Court examined his relationship with the third parties.¹⁵⁰ The Court said, however, that "more important than the nature of the relationship between the litigant and those whose rights he seeks to assert is the impact of the litigation on the third-party interests."¹⁵¹ Since in *Eisenstadt* the enforcement of the statute would prevent unmarried persons from obtaining contraceptives, the Court held that the distributor had standing to assert their rights.¹⁵²

In *Craig v. Boren*¹⁵³ the Court gave its broadest interpretation of third-party standing requirements. In *Craig* a beer vendor sought an injunction and a declaratory judgment on the constitutionality of a state statute prohibiting the sale of beer to men under the age of twenty-one and women under eight-

143. *Id.* at 257.

144. 357 U.S. 449 (1958).

145. *Id.* at 451-53.

146. *Id.* at 459.

147. *Id.* at 459-60.

148. *Id.* at 459.

149. 405 U.S. 438 (1972).

150. The prosecution argued that because the defendant was not a doctor, as in *Griswold*, there was no "professional relationship." The Court, however, stated that "the doctor-patient and accessory-principal relationships are not the only circumstances in which one person has been found to have standing to assert the rights of another." *Id.* at 445. The Court concluded that the relationship was "not simply that between a distributor and potential distributees, but that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so." *Id.*

151. *Id.*

152. *Id.* at 446.

153. 429 U.S. 190 (1976).

een. The vendor argued that her potential male customers were the victims of sex discrimination.¹⁵⁴ In deciding that the vendor had standing to raise the rights of potential male customers who were not parties to the action, the Supreme Court departed from its past tests. The Court made no mention of the relationship between the vendor and the young men or of any obstacle to the men's bringing an action on their own behalf. Instead, the Court focused entirely on the vendor's claim of indirect impairment of the men's constitutional right if she complied with the statute.¹⁵⁵ This focus suggests that the Court may grant standing only when the rights of third parties are "likely to be diluted or adversely affected"¹⁵⁶ if not raised by the litigant.

When these cases are applied to Sumitomo and other American subsidiaries, it appears that a subsidiary's ability to assert the FCN treaty rights of its foreign parent will depend on which test of third-party standing the Court adopts. If the Court follows the approach of *Griswold*, *Barrows*, and *NAACP v. Alabama*, the subsidiary probably will not be allowed standing. Although a substantial relationship between the parent and the subsidiary apparently exists (*i.e.*, the subsidiary is wholly owned by the parent), there is no apparent obstacle to the parent's intervention other than a desire not to subject itself to the jurisdiction of an American court.¹⁵⁷ If the Court adopts the rationale of *Eisenstadt* and *Craig*, however, Sumitomo will have standing because of the impact that compliance with Title VII will have on the Treaty rights of its parent. The subsidiary, therefore, could assert that a denial of its ability to raise its parent's "of their choice" rights under the FCN treaty would "materially impair"¹⁵⁸ the parent's treaty right to control and manage its American subsidiaries by restricting the parent's ability to appoint specific managerial personnel. This loss would arguably require a fundamental change in the nature of both the parent and subsidiary's business practices and could result in substantial economic harm to both parties.

V. TITLE VII AND THE FCN TREATIES

A. *The Sumitomo Decision*

Since the Supreme Court held that Sumitomo was not a company of Japan and was not entitled to the benefit of article VIII(1) of the United States-Japan FCN Treaty,¹⁵⁹ it did not have to resolve any issues of Title VII coverage.¹⁶⁰ The Court specifically declined to address two aspects of the

154. *Id.* at 192.

155. *Id.* at 192-97.

156. *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965).

157. In *Sumitomo* no obstacle appears, on remand, to the Japanese parent corporation's intervention. Inquiries from the authors to the corporation concerning why it did not intervene in *Sumitomo* in the district court or court of appeals indicated a reluctance to submit to federal court jurisdiction.

158. *Craig v. Boren*, 429 U.S. 190, 196 (1976).

159. Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863.

160. Although the plaintiffs in *Sumitomo* premised their action upon both Title VII and 42 U.S.C. § 1981, their § 1981 claims were dismissed by the district court and were not considered by the Second Circuit, 638 F.2d 552, 553 n.1 (2d Cir. 1981). The § 1981 claims were not before the Supreme Court in *Sumitomo*. However, any

propriety of Sumitomo's employment policies under Title VII. First, it did not reach the question whether discrimination on the basis of national citizenship rather than national origin violated Title VII.¹⁶¹ Second, and most important, the Court refrained from expressing any opinion whether Sumitomo could support its assertion of a BFOQ or a business necessity defense.¹⁶²

The remainder of this Article will consider the citizenship discrimination issue and will explore in detail the defenses that incorporated subsidiaries (or foreign corporations, if not totally exempted by an FCN treaty) may have to Title VII. The discussion will emphasize the BFOQ exception to Title VII, which the Second Circuit considered when it decided *Sumitomo*.

B. Citizenship Discrimination and Title VII

Sumitomo asserted in its Supreme Court briefs that its admitted discrimination on the basis of Japanese citizenship did not violate Title VII.¹⁶³ For support it cited the Court's decision in *Espinoza v. Farah Manufacturing Co.*,¹⁶⁴ which held that "nothing in [Title VII] makes it illegal to discriminate on the basis of citizenship or alienage."¹⁶⁵ *Espinoza*, decided in 1973, considered whether discrimination on the basis of citizenship was actionable as national origin discrimination under Title VII. A legally admitted resident alien, Ceilia Espinoza, had applied for employment at a division of Farah Manufacturing Company in San Antonio, Texas. Farah rejected her employment application because of an established company policy against employing aliens.¹⁶⁶

defenses to a Title VII action, whether premised on an FCN treaty, should be applicable to a § 1981 claim as well. This result is consistent with the recognized rule that "in fashioning a substantive body of law under Section 1981 the courts should, in an effort to avoid undesirable substantive law conflicts, look to the principles of law created under Title VII for direction." *Waters v. Wisconsin Steel Works of Int'l Harvester Co.*, 502 F.2d 1309, 1316 (7th Cir. 1974), cert. denied, 425 U.S. 997 (1976). See also *Setser v. Novak Inv. Co.*, 638 F.2d 1137, 1147 (8th Cir. 1981). Moreover, "[I]t seems clear that [§ 1981] affords no greater substantive protection than Title VII." *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 584 n.24 (1979) (action brought *inter alia* under § 1981 by blacks and Hispanics). The BFOQ exception available under Title VII for national origin discrimination also should be available under § 1981 if that statute is held to cover certain types of national origin discrimination. Any other decision would lead to an anomalous result: the more general § 1981 would be construed to encompass conduct specifically exempted from the sanctions of Title VII.

Generally, Title VII and § 1981 have similar requirements and remedies. *Setser v. Novak Inv. Co.*, 638 F.2d 1137 (8th Cir. 1981); *Markey v. Tenneco Oil Co.*, 635 F.2d 497, 498 n.1 (5th Cir. 1981); *Whiting v. Jackson State Univ.*, 616 F.2d 116, 121 (5th Cir. 1980). Under § 1981, however, a plaintiff must prove that the defendant had the intent to discriminate. *General Bldg. Contractors Ass'n v. Pennsylvania*, 102 S. Ct. 3141 (1982).

161. 102 S. Ct. 2374, 2377 n.4 (1982).

162. *Id.* at 2382 n.19. The Court referred to the unresolved issue as whether "Japanese citizenship may be a [BFOQ] for certain positions at Sumitomo or . . . whether a business necessity defense may be available." *Id.* (emphasis added). One early article on *Sumitomo* commented on the Court's use of "Japanese citizenship" in framing the issue, stating:

Because the existence of a BFOQ or business necessity defense to a Title VII action for discrimination on the basis of Japanese citizenship ordinarily would be immaterial unless the Court believed that Title VII would prohibit citizenship discrimination, the lower courts may infer from *Avagliano* that Title VII prohibits employment discrimination on the basis of citizenship as well as national origin whenever the distinction between the two is difficult to discern.

Wolfram & Kartman, *Court Recognized Diplomatic Sensitivity of Sumitomo*, *Legal Times of Washington*, July 19, 1982, at 17, col. 1.

163. Brief for Petitioner and Cross-Respondent at 14-18.

164. 414 U.S. 86 (1973).

165. *Id.* at 95.

166. *Id.* at 87.

Justice Marshall, writing for eight members of the Court, concluded that although the Act protected aliens from illegal discrimination based on race, color, religion, sex, or national origin (for example, the employment of aliens of one ancestry but the refusal to employ aliens of another ancestry), nothing in Title VII made discrimination on the basis of citizenship or alienage unlawful.¹⁶⁷ He brushed aside the argument that the refusal to hire an alien would always disadvantage that individual because of his national origin since persons born in the United States gain citizenship at birth without the formalities required of aliens. Justice Marshall responded that "it is not the employer who places the burdens of naturalization on those born outside the country, but Congress itself, through laws enacted pursuant to its constitutional power"¹⁶⁸

Espinoza, nevertheless, addressed the issue of discrimination on the basis of citizenship as national origin discrimination. Justice Marshall cautioned that "an employer might use a citizenship test as a pretext to disguise what is in fact national origin discrimination. Certainly, Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin."¹⁶⁹ These principles, while significant for American subsidiaries like Sumitomo, lent no support to Mrs. Espinoza's case because ninety-six percent of Farah's employees in the San Antonio division were Mexican-Americans, as were ninety-seven percent of those employees performing the work for which Mrs. Espinoza had applied.¹⁷⁰

The inverse of the *Espinoza* facts was recently presented in two district court cases. In the first, *Novak v. World Bank*,¹⁷¹ the plaintiff claimed that the World Bank's policy of discrimination against United States citizens was responsible for both his lack of promotion and his discharge. The plaintiff contended that this policy violated section 703 of Title VII, which prohibits discrimination on the basis of national origin.¹⁷² Judge Richey held that Mr. Novak's claim of discrimination on the basis of citizenship was foreclosed by *Espinoza*, even though the claimed discrimination was against United States citizens, not aliens. He reasoned:

167. *Id.* at 95.

168. *Id.* at 93 n.6.

169. *Id.* at 92. *Sumitomo* cited the second sentence of this quote in declining to reach the citizenship-discrimination issue. One could infer that the Court questioned whether *Sumitomo's* citizenship discrimination would have the effect of discriminating on the basis of national origin. 102 S. Ct. 2374, 2377 n.4 (1982).

170. 414 U.S. 86, 93 (1973). For post-*Espinoza* EEOC decisions construing Title VII and citizenship discrimination, see EEOC Decision No. 74-85, Feb. 7, 1974, 8 Fair Empl. Prac. Cas. (BNA) 425, 426-27 (Title VII violation found when landowner discharged minority group U.S. citizens to hire aliens but did not discharge Anglo-U.S. citizens); EEOC Decision No. 76-111, June 23, 1976, EMPL. PRAC. GUIDE (CCH) ¶ 6677 (citizenship requirement not the equivalent of national origin bias); EEOC Decision No. 76-133, Aug. 23, 1976, EMPL. PRAC. GUIDE (CCH) ¶ 6695 (discrimination on the basis of citizenship does not constitute national origin discrimination per se); EEOC Decision No. 76-141, Sept. 30, 1976, EMPL. PRAC. GUIDE (CCH) ¶ 6703 (municipality's citizenship requirement not equivalent to national origin discrimination). See also EEOC guidelines on citizenship requirements, 29 C.F.R. § 1606.5 (1982).

171. 20 Fair Empl. Prac. Cas. (BNA) 1166 (D.D.C. 1979).

172. *Id.* at 1167.

As plaintiff's complaint is phrased, Italians or Irish who were naturalized United States citizens would be subject to the same pattern of discrimination which he allegedly encountered; by the same turn, an American who became an Irish or Italian citizen would benefit from that discrimination. It is clear that such discrimination as has been alleged involves only that based on citizenship and under *Espinoza*, it does not state a violation of Title VII.¹⁷³

As Judge Richey recognized, citizenship discrimination that does not have the effect of discriminating against one national origin group vis-à-vis another does not violate Title VII's proscriptions.

In *Dowling v. United States*¹⁷⁴ the plaintiff alleged that the National and World Hockey Leagues discriminated against him as a United States citizen by employing only Canadian referees. The district court held that the plaintiff failed to state a claim upon which relief could be granted because Title VII does not bar employment discrimination based on citizenship or alienage.¹⁷⁵ The court did not, however, analyze whether the citizenship discrimination might have the effect of discriminating on the basis of national origin, since many of the favored referees may have been of a particular ancestry (*e.g.*, French).

*Novak*¹⁷⁶ and *Dowling*¹⁷⁷ are significant for their application of *Espinoza* to discrimination against United States citizens. *Novak* also scrutinized apparent citizenship discrimination to determine whether it had the effect of discriminating on the basis of national origin. These cases complete the legal framework for the analysis of the issues presented by Sumitomo and of those likely to be presented by the hiring policies of foreign companies and their subsidiaries operating in the United States.

Sumitomo's Supreme Court briefs elaborated on its preference for Japanese nationals. Its preference for Japanese citizens in management positions was not formulated to exclude any particular nationality and was not concerned with national origin.¹⁷⁸ According to Sumitomo, "The group not preferred consists of persons of every other nationality, U.S. or otherwise, and persons of every conceivable national origin, including those who by birth or ancestral background might be regarded by some, or consider themselves 'Japanese,' but who are not Japanese nationals."¹⁷⁹ As one might expect, Lisa Avigliano and many of the amici curiae took issue with Sumitomo's characterization of its preference for Japanese nationals.

Avigliano's brief responded that the use of Japanese citizenship as a requirement for employment would create as a natural consequence an "extraordinarily homogeneous" work force.¹⁸⁰ Avigliano cited statistics indicat-

173. *Id.*

174. 476 F. Supp. 1018 (D. Mass. 1979).

175. *Id.* at 1022.

176. 20 Fair Empl. Prac. Cas. (BNA) 1166 (D.D.C. 1979).

177. 476 F. Supp. 1018 (D. Mass. 1979).

178. Brief for Petitioner and Cross-Respondent at 17.

179. *Id.*

180. Brief for Respondents and Cross-Petitioner at 18.

ing that ninety-nine percent of the population of Japan is composed of individuals of Japanese ethnic origin.¹⁸¹ She argued that Sumitomo's Japanese citizenship requirement for its managerial staff would logically dictate that the staff be composed of individuals of Japanese ethnic and racial origin.¹⁸²

An analysis of this Japanese citizenship requirement was necessary, said Avigliano, to determine whether it had the purpose or effect of discriminating on the basis of national origin.¹⁸³ If the preference did so, under the *Espinoza* holding it would violate Title VII. The Avigliano brief pointed out, however, that at the present stage of the proceedings (no trial on the merits having taken place) it was impossible to determine the issue.¹⁸⁴

The Avigliano brief apparently is correct about the proper method of resolving the citizenship discrimination issue. It would be an easy, but simplistic, leap of logic to assume that Sumitomo's preference for Japanese citizens would also mean a preference for those of Japanese national origin. For other nations the analysis would be more complex. A company preferring West German or Nicaraguan citizens arguably does not discriminate on the basis of national origin, since persons of diverse ancestry may be German or Nicaraguan citizens.¹⁸⁵ Hence, the better way to lay the issue to rest is to examine work-force statistics and applicant data to discover the actual impact of the Japanese or any other citizenship requirement for employment.

C. Potential Defenses to Title VII Liability for Subsidiaries or Branches of Foreign Companies Operating in the United States

One can establish a prima facie case of employment discrimination under Title VII using two theories: the disparate treatment theory and the disparate impact theory.¹⁸⁶ The disparate treatment theory requires the plaintiff to prove that the employer treated certain individuals differently from others

181. *Id.*

182. *Id.*

183. *Id.* at 19. See Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers*, 31 STAN. L. REV. 947, 957-58 & n.60 (1979), for a discussion of the citizenship-discrimination issue in the context of Japanese employers.

184. Brief for Respondents and Cross-Petitioner at 19. In *Porto v. Canon, U.S.A., Inc.*, 28 Fair Empl. Prac. Cas. (BNA) 1679 (N.D. Ill. 1981), Judge Decker used an approach that would be more favorable to an employer's claim of citizenship discrimination. He concluded:

[I]f defendant is illegally discriminating in favor of persons of Japanese national origin who are not Japanese citizens, a cause of action under Title VII may be stated. However, if defendant is discriminating only in favor of Japanese *citizens* and not in favor of persons of Japanese national origin, it is doubtful that a cause of action is stated under Title VII.

Id. at 1684 n.3 (emphasis in original).

185. Avigliano's brief recognized this distinction regarding American citizenship: "Americans are an extremely heterogeneous, multinational people. Generally, therefore, an American citizenship requirement will not eliminate persons from different national origins or races from an employer's workplace." Brief for Respondents and Cross-Petitioner at 18.

186. See generally B. SCHLEI & P. GROSSMAN, *supra* note 110, at 1147-96; C. SULLIVAN, M. ZIMMER & R. RICHARDS, *FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION* § 1.6, at 60-67 (1980). Some commentaries predict that the two theories are merging. Furnish, *A Path Through The Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine*, 23 B.C.L. REV. 419 (1982).

based on their race, color, religion, sex, or national origin. Proof of discriminatory intent or motive is required.¹⁸⁷ The disparate impact theory applies when employment practices neutral on their face operate more harshly or disproportionately on one group than on another. A plaintiff need not prove discriminatory intent in a disparate impact case.¹⁸⁸ A plaintiff can apply either theory or both theories to a particular set of facts.¹⁸⁹

The principal defenses to these two theories of Title VII employment discrimination will be of prime concern to subsidiaries such as Sumitomo (or branches of foreign corporations if they are not found completely exempt from Title VII under the provisions of an applicable FCN treaty). Sex and national origin discrimination cases with disparate impact discrimination are subject to the business necessity defense, and those with overt disparate treatment discrimination are subject to the BFOQ exception.¹⁹⁰

In *Sumitomo* a difference of opinion arose over the proper defense to be applied to the subsidiary's preference for Japanese citizens. The Second Circuit applied the BFOQ exception, perhaps believing that Sumitomo's preference for Japanese nationals was disparate treatment because of the exclusion of applicants of other nationalities.¹⁹¹ If Sumitomo's citizenship preference had the effect of discriminating against individuals on the basis of their national origin, however, then the proper defense was business necessity.¹⁹² The Supreme Court in *Sumitomo* did not commit itself to either defense. Instead, it merely declared that it would "express no view" whether either might be available.¹⁹³

The following section of this Article will consider the BFOQ exception and the business necessity defense as they would apply to subsidiaries such as Sumitomo or to foreign branches doing business in the United States.

187. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1275 (9th Cir. 1981); *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361, 369 (4th Cir. 1980), *cert. denied*, 101 S. Ct. 1480 (1981).

188. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977); *Dothard v. Rawlinson*, 433 U.S. 321, 332-34 (1977); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 137-38 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1275 (9th Cir. 1981); *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361, 369 (4th Cir. 1980).

189. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977). See also *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251 (6th Cir. 1981); *Levin v. Delta Air Lines, Inc.*, 29 Empl. Prac. Dec. (CCH) ¶ 32,905 (S.D. Tex. 1982); *Presseisen v. Swarthmore College*, 442 F. Supp. 593 (E.D. Pa. 1977), *aff'd*, 582 F.2d 1275 (3d Cir. 1978). See also *McCosh v. City of Grand Forks*, 628 F.2d 1058 (8th Cir. 1980) (plaintiff proceeded under disparate treatment and disparate impact theories).

190. See *Dothard v. Rawlinson*, 433 U.S. 321, 329, 332-34 (1977); *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361, 369-70 (4th Cir. 1980). See also (regarding sex discrimination) *B. SCHLEI & P. GROSSMAN*, *supra* note 110, at 278-93; *id.* at 84-86 (Supp. 1979). One should note that the statutory BFOQ defense is restricted to sex, religion, or national origin and is not available as a defense to race discrimination in employment. See 42 U.S.C. § 2000e-2(e) (1976). See also *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1181 (7th Cir. 1982); *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361, 370 n.13 (4th Cir. 1980); *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 297 n.11 (N.D. Tex. 1981).

191. 638 F.2d 552, 559 (1981).

192. *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 525 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

193. 102 S. Ct. 2374, 2382 n.19 (1982).

1. *The BFOQ Exception*

The BFOQ exception mentioned by the Supreme Court in *Sumitomo* is found in section 703(e) of Title VII. It provides:

[I]t shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of . . . sex, or national origin in those certain instances where . . . sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise¹⁹⁴

To determine whether this exception is properly applicable to *Sumitomo* and others similarly situated, one must review its legislative history and its interpretation by the EEOC and courts.

a. *Legislative History*

The legislative history of the BFOQ exception, whether dealing with national origin or sex discrimination, unfortunately is very limited.¹⁹⁵ In the House debates Representative Dent indicated that national origin could be a proper BFOQ in employing individuals in a restaurant featuring the cuisine of a particular country, such as France or Italy.¹⁹⁶ Representative Rodino reached the same conclusion.¹⁹⁷

The BFOQ exception's application to sex discrimination was discussed briefly after the House added sex as a proscribed classification to Title VII.

194. 42 U.S.C. § 2000e-2(e) (1976). One commentator asserts that the BFOQ provision's "to hire and employ" phrasing restricts its coverage to only those employment activities. I A. LARSON, *EMPLOYMENT DISCRIMINATION* § 13.00, at 4-1 (1982). The authors of another treatise on the subject, however, feel this construction of the provision is "overly technical." C. SULLIVAN, M. ZIMMER & R. RICHARDS, *FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION* § 2.4, at 137 n.2 (1980). Hence, "[I]f it were legal to hire only men . . . because of their sex . . . it would surely be permissible to also hire women but on more restricted terms regarding their duties than were applied to men." *Id.*

195. See 110 CONG. REC. 2549 (1964); 110 CONG. REC. 7212-13 (1964). See also the discussion of the limited legislative history of the BFOQ exception in Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025, 1027-33 (1977).

196. 110 CONG. REC. 2549 (1964). Representative Dent stated:

It has just been called to my attention that a French restaurant or a specific restaurant that deals in foods that are of a certain national type, foods like Italian foods, a person who runs such a restaurant would want to have a chef, and in advertising for a chef he would want to say that he wanted a chef but only those of a certain national origin, say Italy, need apply. There is nothing wrong with that because he would hardly be doing his business justice by advertising for a Turk to cook spaghetti.

Representative Dent did concede that "there is no reason the dishwasher would have to be of a certain national origin." *Id.* Representative Dent also commented on the scope of the BFOQ exception:

[W]e have stores in this country that sell religious articles. They would be advertising for someone to work as a salesman or salesgirl in that particular store, and they would say that a person of, say, the Roman Catholic religion should apply for the job, because the articles they sold would relate to that faith. *We do not want in any way to force them in that particular type of application to take somebody who would not be helpful to their business, would we?*

Id. (emphasis added). Representative Dent's comments would appear to sanction customer preference as a BFOQ.

197. *Id.* Representative Rodino explained:

[W]e would assume that a baker, chef, or cook of Italian origin is especially qualified to make pizza pies, and going further the gentlemen recognizes that if there is a "pizzeria," which is a pizza pie establishment, the employer or operator of that pizza pie restaurant would probably seek as a chef a person of Italian origin. He would do this because pizza pie is something he believes the Italians or

Representative Goodell of New York advocated adding sex to the BFOQ section, declaring:

There are so many instances where the matter of sex is a bona fide occupational qualification. For instance, I think of an elderly woman who wants a female nurse. There are many things of this nature which are a bona fide occupational qualification, and it seems to me they would be properly considered here as an exception.¹⁹⁸

Representative Goodell's description of the BFOQ as a significant authorization for sex discrimination was not circumscribed during the floor debate.

Senators Joseph S. Clark and Clifford P. Case, Senate floor managers of Title VII, submitted an interpretative memorandum of Title VII that is another source of commentary about the BFOQ exception to national origin and sex discrimination.¹⁹⁹ The memorandum described the BFOQ as creating "certain limited exceptions" to Title VII's general prohibition.²⁰⁰ It cited as examples of "legitimate discrimination" the "preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business that seeks the patronage of members of particular religious groups for a salesman of that religion."²⁰¹

These examples of BFOQ exceptions do not clearly reveal their underlying rationales, nor do the examples given in the debates. They could be premised on characteristics generally associated with members of a particular nationality or sex, on qualities thought to be inherent in a particular nationality or sex, or in the case of the cook, on a customer's demand for authenticity when frequenting a restaurant identified with a particular nationality.

An Italian or Frenchman chosen at random may not be able to properly prepare Italian or French cuisine as it is recognized by American diners. The chances of any Italian being able to cook a specific dish, such as pizza, diminish even further. Certainly, Italians have no inherent talent for making pizzas, and indeed, non-Italians may do a better job. The most that can be said is that many native-born Italians (and many Italians who are chefs) may be able to prepare some Italian dishes. If the ability to prepare the cuisine of a country is the paramount consideration, then perhaps foreign training for the chef is the key. The simplest explanation for the examples given is the customer's desire for authenticity when choosing a restaurant of a particular nationality, whether French, Italian, or Chinese. Restaurant patrons might

people of Italian national origin are able to make better than others—and is reasonably necessary to the operation of his particular business.

Hence, Representative Rodino concluded:

[N]ational origin in the operation of a specialty restaurant such as a French restaurant or Italian restaurant could properly be an occupational qualification that is reasonably necessary to the operation of his particular business.

198. *Id.* at 2718.

199. *Id.* at 7212–13.

200. *Id.*

201. *Id.*

prefer to dine in an Italian restaurant with an Italian chef since they believe he or she will prepare more authentic food.

While the legislative history of the BFOQ is not highly illuminating, it does reflect the intent to create a significant exclusion for certain forms of national origin discrimination. The cited examples of BFOQs and sex discrimination also create exceptions that would support common societal attitudes about women.²⁰² The national origin examples, however, are broader in application than those regarding sex discrimination.²⁰³

b. *The EEOC and the Courts*

The EEOC has issued guidelines concerning the BFOQ provision that give the exception a restrictive interpretation.²⁰⁴ These guidelines depart from the congressional intent manifested in the legislative debates and the interpretative memorandum.²⁰⁵

The guidelines concerning national origin discrimination briefly state that "[t]he exception stated in Section 703(e) of Title VII, that national origin may be a bona fide occupational qualification, shall be strictly construed."²⁰⁶ The Commission's guidelines for sex as a BFOQ are more detailed and also offer some guidance for the exception's application in the national origin area. The guidelines provide that sex is not a BFOQ when the refusal to hire a woman because of her sex results from stereotyped assumptions concerning the "employability" of women, including the assumption that women have greater turnover rates than men.²⁰⁷

Moreover, the BFOQ exception is not applicable when the refusal to hire is based on "stereotyped characterizations of the sexes," for example, that men are less adept at assembling intricate equipment and that women make less forceful salespersons.²⁰⁸ Finally, the preferences of coworkers, employers, or customers do not qualify except when sex is required for authenticity or genuineness.²⁰⁹ The EEOC has attempted to restrict the authenticity defense to actors and actresses.²¹⁰

The courts have developed tests to determine when the BFOQ exception is appropriate, but only in the context of sex discrimination. The dearth of

202. Other commentaries on the legislative history of the BFOQ exceptions agree with this conclusion. See Sirota, *supra* note 195, at 1032, in which the author finds that the discernible legislative history "indicates that Congress intended the BFOQ provision specifically pertaining to sex as a broad justification for sex discrimination." See also in this regard B. SCHLEI & P. GROSSMAN, *supra* note 110, at 279. See W. DIEDRICH, JR. & W. GAUS, *DEFENSE OF EQUAL EMPLOYMENT CLAIMS* 44-46 (1982), for a summary of the case law dealing with the BFOQ exception.

203. See generally B. SCHLEI & P. GROSSMAN, *supra* note 110, at 266-67.

204. Congress authorized the EEOC to draft guidelines pursuant to § 713(b) of Title VII. 42 U.S.C. § 2000e-12 (1976).

205. See *supra* notes 195-201 and accompanying text.

206. 29 C.F.R. § 1606.4 (1982).

207. *Id.* § 1604.2(a)(1)(i).

208. *Id.* § 1604.2(a)(1)(ii).

209. *Id.* § 1604.2(a)(1)(iii), (a)(2).

210. *Id.* § 1604.2(a)(2).

national origin BFOQ cases requires that tests be drawn from the analogous, though not identical, area of gender-based BFOQs.²¹¹ The majority of courts have followed a restrictive construction of the BFOQ defense.²¹²

The Fifth Circuit in *Weeks v. Southern Bell Telephone & Telegraph Co.*²¹³ developed one of the three most prominent tests for the BFOQ exception. In *Weeks* the female plaintiff had been refused a switchman's position because it required lifting and other "strenuous" activities thought to be beyond the capabilities of women.²¹⁴ The court formulated the test as follows:

[I]n order to rely on the bona fide occupational qualification exception *an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.*²¹⁵

*Diaz v. Pan American World Airways, Inc.*²¹⁶ presented the Fifth Circuit with another opportunity to formulate a test for sex as a BFOQ. Pan American maintained that being female was a BFOQ for the position of flight attendant. In support it presented evidence that female attendants were more successful in handling the psychological needs of passengers and that although some males had similar abilities, no employment selection devices existed that could identify those males.²¹⁷

In scrutinizing Pan American's asserted BFOQ defense the court declared:

[T]he use of the word "necessary" in section 703(e) requires that we apply a *business necessity* test, not a *business convenience* test. That is to say, discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively.²¹⁸

211. Neither Larson nor Schlei and Grossman have found any reported cases construing the BFOQ exception regarding national origin discrimination. See 3 A. LARSON, *supra* note 194, § 95.40, at 20-30; B. SCHLEI & P. GROSSMAN, *supra* note 110, at 267.

212. With the development of the BFOQ exception, a difference of opinion has arisen concerning the viability of the Italian chef example discussed during the legislative debates. One commentator has opined that "it is exceedingly unlikely that a French or Italian restaurant could actually demonstrate a national origin BFOQ in the hiring of chefs." Allegretti, *National Origin Discrimination and the Ethnic Employee*, 6 EMPLOYEE REL. L.J. 544, 560 n.21 (1981). *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1178 n.63 (1971), stated that the chef example "should probably be limited to cases in which restaurant patrons are aware of the chef's nationality." But see 1 A. LARSON, *supra* note 194, § 15.20, at 4-23 n.29, where the treatise indicates

this should be under the BFOQ exception, even if the chef is hidden back in the kitchen and not on public display like the waiters and waitresses. It must be assumed that his true origins will come to light. If it became known that the head chef was Ole Hanson, who became an expert in French cooking by watching Julia Child on his television set in Mitchell, South Dakota, the total "product" of the restaurant would never be quite the same as if the chef were Pierre Duchamps, fresh from the Champs Elysées.

For a detailed explanation of the scope and application of the BFOQ exception to sex discrimination, see 1 A. LARSON, *supra* note 194, §§ 13.00-17.00, at 4-1 to 4-59; B. SCHLEI & P. GROSSMAN, *supra* note 110, at 279-93; *id.* at 84-86 (Supp. 1979); Sirota, *supra* note 195, at 1059-72.

213. 408 F.2d 228 (5th Cir. 1969).

214. *Id.* at 234.

215. *Id.* at 235 (emphasis added).

216. 442 F.2d 385 (5th Cir. 1971).

217. *Id.* at 387.

218. *Id.* at 388 (emphasis in original).

Applying this standard, the court rejected the proposed BFOQ defense because the essence of the airline's business was the safe transportation of passengers. Pan American did not suggest that male flight attendants would affect the airline's ability to provide safe transportation. The court found that the nonmechanical functions at which women excelled were collateral to the principal task of the airline.²¹⁹

Some courts have applied a variation of the *Diaz* test. While the *Diaz* court sought to determine whether "the essence of the business operation would be undermined," other courts have looked only to whether the essence of the subject position would be undermined.²²⁰ This variant, when dispositive, is less stringent and conforms more closely to the BFOQ's legislative history since the hiring need not undermine the employer's total enterprise.

*Rosenfeld v. Southern Pacific Co.*²²¹ articulated the final major BFOQ test. The court concluded, after reviewing the legislative history and EEOC regulations, that "sexual characteristics, rather than characteristics that might, to one degree or another, correlate with a particular sex must be the basis for the application of the BFOQ exception."²²² Thus, the court's inquiry for BFOQ purposes was into sexual characteristics, not into qualities that are found more frequently in one sex than in another because of cultural influences.²²³

When applied, the *Weeks* and *Diaz* tests are cited frequently as two prongs of a single test. Thus stated, the test becomes: "(1) [D]oes the partic-

219. *Id.*

220. For a discussion of this variant, see *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 300 n.17 (N.D. Tex. 1981), in which the court concluded:

[T]his difference in application will rarely be outcome determinative. A finding that one sex is essential to job performance will almost by necessity require the conclusion that the essence of the business operation would be undermined by not hiring members of that sex exclusively. The exception would be where the job or business need requiring employees of one sex only could be eliminated entirely without 'undermining' the business itself.

In *Dothard v. Rawlinson*, 433 U.S. 321, 333-36 (1977), the Court framed the test in terms of the "essence of the business operation," but examined the "essence of the correctional counselor's job." See also *Sirota*, *supra* note 195, at 1043-44 & n.113.

221. 444 F.2d 1219 (9th Cir. 1971).

222. *Id.* at 1225.

223. The same commentary that suggested the *Rosenfeld* test maintains that the legislative history of the nationality BFOQ would limit the use of the exception to situations in which unique qualities inherent in the nationality were concerned rather than characteristics "commonly associated with members of [the] group." *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1178-79 (1971). The Supreme Court, however, has not adhered to those standards uniformly, even in cases of sex discrimination. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1972), in which the Supreme Court gave a more liberal interpretation to the BFOQ exception. In *Phillips* the company did not employ women with pre-school-age children, but hired men with these children. *Id.* The Court held the practice discriminatory on the basis of sex, but remanded the case for the trial court to consider whether a BFOQ would apply to the absence of conflicting family obligations, which would have an impact on an employee's ability to perform his or her job. The Court declared:

The existence of such conflicting family obligations, if demonstrably more relevant to a job performance for a woman than for a man, could arguably be a basis for distinction under § 703(e) of the Act. But that is a matter of evidence tending to show that the condition in question "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

Id.

ular *job* under consideration require that the worker be of one sex only; and if so, (2) is that requirement reasonably necessary to the 'essence' of the employer's business."²²⁴

The *Rosenfeld* test may be the most difficult of the three tests to transform into a test for national origin BFOQs since it focuses on novel sexual attributes. Presumably, the unique attributes of a particular nationality would include those connected with its language, culture, and mores. The dividing line between unique attributes and those commonly associated with the group is, admittedly, not bright. Under the *Rosenfeld* test stereotypical attributes—for example, that the Irish are prone to drunkenness, that Mexicans are lazy, or that Germans are good with numbers—plainly would not pass muster.

By its emphasis on unique attributes, the *Rosenfeld* test would operate more stringently in certain respects than either the *Weeks* or *Diaz* tests. The *Weeks* test considers whether "all or substantially all" members of a nationality would be unable to fulfill the job requirements, and *Diaz* inquires into whether the "essence" of the business would be jeopardized by not hiring solely members of one nationality.²²⁵ If, however, unique attributes could be identified under the *Rosenfeld* test, it would operate more leniently, requiring no finding of business necessity. Based on the existing legislative history, the *Diaz* and *Weeks* standards may come closer to effectuating the congressional purpose in enacting the BFOQ provision.²²⁶

The Supreme Court's decision in *Dothard v. Rawlinson*²²⁷ also is relevant to the present inquiry since it emphasized the limited nature of the BFOQ exception for sex. After reviewing the language of section 703(e), its legislative history, and its interpretation, Justice Stewart concluded that the BFOQ exception was intended to be "an *extremely narrow* exception to the general prohibition of discrimination on the basis of sex."²²⁸ *Dothard* held, however, that sex was a BFOQ for correctional counselors in Alabama maximum-security male penitentiaries because "[t]he employee's very womanhood would thus directly undermine her capacity to provide security that is the essence of

224. *Wilson v. Southwest Airlines C.*, 517 F. Supp. 292, 299 (N.D. Tex. 1981) (emphasis in original).

225. For a comparison and contrast of the *Rosenfeld*, *Weeks*, and *Diaz* tests, see B. SCHLEI & P. GROSSMAN, *supra* note 110, at 287-90; Sirota, *supra* note 195, at 1046-47. Even the *Diaz* test as it has evolved would require modification to be applicable to the national origin discrimination case. For

[a]fter *Diaz* the weight of authority seems to be that claims of BFOQ, based upon "ability to perform" will only be sustained where being of a particular sex goes to the "essence" of the job. This definition of BFOQ is limited to *primary* and does not include *secondary*, sexual characteristics. . . . Primary sexual characteristics are those which relate to the reproduction functions. Secondary sexual characteristics, such as strength, are generally attributal to a particular sex but not necessarily exhibited by all members of a sex and are therefore not BFOQ.

B. SCHLEI & P. GROSSMAN, *supra* note 110, at 290 & n.13 (emphasis added).

These criteria obviously do not apply to the national origin situation. As will be discussed at a later point in this Article, defining "primary" and "secondary" characteristics in the national origin discrimination area would be difficult and is not required by the exception's legislative history.

226. See *supra* note 192.

227. 433 U.S. 321 (1977).

228. *Id.* at 334 (emphasis added).

a correctional counselor's responsibility."²²⁹ The Court viewed the situation differently from the district court and from Justices Marshall and Brennan, who argued in dissent that the administrative regulation requiring male correctional counselors was premised on stereotypical attitudes toward women.²³⁰

c. BFOQs Based on Customer Preferences and Related Justifications

The EEOC guidelines on sex discrimination provide that the BFOQ exception may not be properly applied to "[t]he refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers."²³¹ The only exception sanctioned by the EEOC is when sex is necessary for authenticity.²³² The EEOC has followed the guidelines unswervingly.²³³

Some doubt exists whether the EEOC has correctly interpreted the legislative history of the BFOQ provision.²³⁴ Indeed, courts have not always followed EEOC guidance in this area. The court in *Local 246, Utility Workers Union v. Southern California Edison Co.*,²³⁵ in dicta, extended the authenticity exception beyond cases concerning actors and actresses and opined that Chinese nationality for waiters and waitresses would be a BFOQ to maintain the authentic atmosphere of a Chinese restaurant. In *Swint v. Pullman-Standard*²³⁶ the Fifth Circuit concluded, after reviewing the legislative history, that customer preference may be a basis for BFOQs in sex, national origin, and religious discrimination.²³⁷ Conversely, in *Diaz* the court had given deference to the EEOC guidelines, concluding:

[I]t would be totally anomalous if we were to allow the preferences and prejudices of customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers.²³⁸

229. *Id.* at 336.

230. Justice Marshall, with whom Justice Brennan joined, in an opinion that concurred in part and dissented in part, declared: "[T]he fundamental justification for the decision is that women as guards will generate sexual assaults. With all respect, this rationale regrettably perpetuates one of the most insidious of the old myths about women—that women, wittingly or not, are seductive sexual objects." *Id.* at 345.

231. 29 C.F.R. § 1604.2(a)(1)(iii) (1982).

232. *Id.* § 1604.2(a)(2).

233. See in this regard EEOC Decision No. 71-2338, 1973 EEOC Dec. (CCH) 4437 (1971) (the customers' preference for male hosts to accompany them to football games, dinners, and hunting trips did not support BFOQ exception); EEOC Decision No. 70-11, 1973 EEOC Dec. (CCH) 4048 (1969) (employer's refusal to hire female as courier guard-driver of armored car based on loss of client confidence in the employer's ability to furnish necessary security did not justify BFOQ for males).

234. See *supra* text accompanying notes 204-210. For a discussion of customer preferences and their role in establishing BFOQs, see 1 A. LARSON, *supra* note 194, § 15.40, at 4-29 to 4-34; Sirota, *supra* note 195, at 1055-56.

235. 320 F. Supp. 1262, 1265 (C.D. Cal. 1970).

236. 624 F.2d 525 (5th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981).

237. *Id.* at 535.

238. 442 F.2d 385, 389 (5th Cir. 1971).

The customer preference issue as it relates to sex discrimination was reviewed exhaustively in *Wilson v. Southwest Airlines Co.*²³⁹ In *Wilson* the defendant called on the court to decide whether female sex appeal was a BFOQ for flight attendants and ticket agents at Southwest Airlines. The airline contended that females were necessary to perform certain nonmechanical portions of the positions under scrutiny, namely, to attract male customers who favor female attendants and ticket agents and to perpetuate the authenticity of the airline's female corporate personality.²⁴⁰

The court declined to hold sex a BFOQ, concluding that Southwest's paramount task was the safe, rapid transportation of passengers.²⁴¹ Flight attendants and ticket agents performed primarily non-gender-oriented, mechanical tasks.²⁴² The court concluded that for Southwest, sex and entertainment were not the dominant services sought. The essence of the business, therefore, would not be jeopardized by hiring males.²⁴³

*Diaz*²⁴⁴ and *Wilson*²⁴⁵ indicate some defined limits for the BFOQ defense to sex discrimination for domestic United States businesses unconnected with foreign nations. The employment of sex or national origin preferences in the foreign or international arena may require the consideration of other criteria in the application of the BFOQ provision.

Significantly, an early commentary on the BFOQ exception suggested different treatment for jobs requiring interaction with discriminatory national cultures.²⁴⁶ Gender, according to the commentary, may be a BFOQ for positions subject to foreign discrimination outside the jurisdiction of Title VII. An example cited was that only males could be employed for jobs primarily requiring business dealings with foreign cultures in which such interaction with women is considered taboo.²⁴⁷ This example illustrates a problem in the enforcement of Title VII when its prohibitions collide with foreign cultural preferences and prejudices that are beyond its reach.

The Ninth Circuit grappled with this problem in *Fernandez v. Wynn Oil Co.*²⁴⁸ In *Fernandez* the company asserted that gender was a BFOQ for the

239. 517 F. Supp. 292 (N.D. Tex. 1981).

240. *Id.* at 302.

241. *Id.*

242. *Id.*

243. *Id.* The Court discounted Southwest's argument that its primary business function was to make a profit, declaring:

For purposes of BFOQ analysis, however, the business "essence" inquiry focuses on the particular service provided and the job tasks and functions involved, not the business goal. If an employer could justify employment discrimination merely on the grounds that it is necessary to make a profit, Title VII would be nullified in short order.

Id. n.25. But see Lopatka, A 1977 *Primer on the Federal Regulation of Employment Discrimination*, 1977 U. ILL. L.F. 69, 96, in which the author argues that the essence approach to the proof of a BFOQ disregards "the reality that the essence of any employer's business is running a profitable enterprise, and even job duties which a court may consider non-essential may be critical to an employer's *ratio vivendi*."

244. 442 F.2d 385 (5th Cir. 1971).

245. 517 F. Supp. 292 (N.D. Tex. 1981).

246. *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1186 (1971).

247. *Id.*

248. 653 F.2d 1273 (9th Cir. 1981), *rev'g* 20 Fair Empl. Prac. Cas. (BNA) 1162 (C.D. Cal. 1979).

position of Director of International Operations. Wynn Oil had substantial overseas operations, including in Latin America and Southeast Asia. Company officials testified that a woman would not be accepted as Wynn's Director of International Operations because of the "prevalent mores relating to the proper roles of men and women in those countries."²⁴⁹ One executive of Wynn Oil testified that the company's South American customers and distributors would consider it offensive to transact business in a woman's hotel room.²⁵⁰

Based on this testimony, the district court found that sex was a BFOQ, reasoning that to have employed Mrs. Fernandez "would have totally subverted any business Wynn hoped to have accomplished in those areas of the World."²⁵¹

The Ninth Circuit rejected the district court's analysis of the BFOQ issue, finding "no factual basis for linking sex with job performance."²⁵² According to the appellate court, Wynn had offered no proof which illustrated that the Director of International Operations position required transacting business in hotel rooms.²⁵³ Moreover, the court concluded in dicta that it would reject the district court's holding on the BFOQ issue regardless of proof because it was premised on a faulty interpretation of Title VII's requirements.²⁵⁴

By declining to find gender a BFOQ, the court confirmed that neither stereotypical notions of male and female roles nor stereotypical customer preferences qualify under the exception.²⁵⁵ Finally, the court addressed and rejected Wynn's argument that a separate rule should pertain in the international setting. The court premised this rejection on its belief that while the United States could not mandate sexual equality in employment in foreign nations, the lower court's reasoning would allow foreign nations to require discrimination in this country.²⁵⁶

The courts have, however, allowed at least one species of customer preference to become the basis for a gender BFOQ. This is in the area of sexual privacy in which, unlike the *Diaz* situation, the underlying purpose of Title VII is deemed not to be "to make over the accepted mores and personal

249. 20 Fair Empl. Prac. Cas. (BNA) 1162, 1164 (C.D. Cal. 1979).

250. 653 F.2d 1273, 1276 (9th Cir. 1981); 20 Fair Empl. Prac. Cas. (BNA) 1162, 1165 (C.D. Cal. 1979).

251. 20 Fair Empl. Prac. Cas. (BNA) 1162, 1165 (C.D. Cal. 1979).

252. 653 F.2d 1273, 1276 (9th Cir. 1981).

253. *Id.*

254. *Id.*

255. *Id.* at 1276-77.

256. *Id.* at 1277. The Ninth Circuit acknowledged that the EEOC had rejected a defense premised on the accommodation of racially discriminatory policies of other nations. *Id.* See EEOC Decision No. 72-0697, 1971 EEOC Dec. (CCH) 4569. The Court also cited *American Jewish Congress v. Carter*, 19 Misc. 2d 205, 190 N.Y.S.2d 218 (Sup. Ct. 1959), modified, 10 A.D.2d 833, 199 N.Y.S.2d 157 (1960), *aff'd*, 9 N.Y.2d 223, 173 N.E.2d 788, 213 N.Y.S.2d 60 (1961). In *Carter* the New York Court of Appeals rejected the Arab-American Oil Company's defense that religion was a BFOQ for job applicants for work in Saudi Arabia. *But see* *South Afr. Airways v. New York State Div. of Human Rights*, 64 Misc. 2d 707, 315 N.Y.S.2d 651 (Sup. Ct. 1970). See generally Note, *Republic of South Africa's Visa Policy*, 13 HARV. INT'L L.J. 132 (1972).

sensitivities of the American people.”²⁵⁷ These sensitivities are believed to be so deeply held that courts will not intrude, even when some members of the sex affected do not object to the intrusion by persons of the opposite sex.²⁵⁸ Thus, with very limited exceptions the courts have rejected customer preference as a foundation for a gender BFOQ. A defense for foreign branches or subsidiaries must be constructed on this foundation of case law regarding BFOQs.

2. *The Application of the BFOQ Exception to Foreign Subsidiaries or Branches Operating in the United States*

The Supreme Court in *Sumitomo* offered no guidance whether or to what extent the BFOQ exception might be a viable defense.²⁵⁹ It only recognized that some positions in the American subsidiaries of Japanese companies required “great familiarity with not only the language of Japan, but also the culture, customs, and business practices of that country.”²⁶⁰ The Second Circuit, conversely, had adopted the BFOQ exception to harmonize both Title VII and the treaty rights of the subsidiaries, while giving proper weight to the unique requirements of the subsidiaries.²⁶¹ It delineated the unique requirements as (1) knowledge of the Japanese language and culture; (2) familiarity with Japanese products, markets, business practices, and customs; (3) acquaintance with the staff and functioning of the Japanese parent enterprise; and (4) “acceptability” to the customers or clients of the company or branch.²⁶²

A review of the requirements listed by the Second Circuit indicates an intent to expand the BFOQ exception, or at least an attempt to fill certain interstices in the law as it relates to international employment. The fourth requirement essentially adopted customer preference as a BFOQ criterion.²⁶³ The appellate court did not, however, consider the BFOQ provision in reviewing Avigliano’s claim of sex discrimination.²⁶⁴ Hence, the BFOQ exception first must be analyzed in terms of national origin and then gender discrimination.

The Supreme Court briefs give an indication of where the various participants stood on the BFOQ issue. Even Avigliano acknowledged that some

257. 1 A. LARSON, *supra* note 194, § 14.30, at 4–8. See also *Backus v. Baptist Medical Center*, 510 F. Supp. 1191, 1195 (E.D. Ark. 1981), *vacated on other grounds*, 671 F.2d 1100 (8th Cir. 1982); *Sutton v. National Distillers Prods. Co.*, 445 F. Supp. 1319 (S.D. Ohio 1978), *aff’d*, 628 F.2d 936 (6th Cir. 1980); *Fesel v. Masonic Home*, 447 F. Supp. 1346 (D. Del. 1978), *aff’d mem.*, 591 F.2d 1334 (3d Cir. 1979); *EEOC v. Mercy Health Center*, 29 Fair Empl. Prac. Cas. (BNA) 159 (W.D. Okla. 1982). Contrast *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) (Title VII meant to overcome customer preferences and prejudices).

258. *Brooks v. ACF Indus.*, 28 Fair Empl. Prac. Cas. (BNA) 1373 (S.D. W. Va. 1982).

259. 102 S. Ct. 2374, 2382 n.19 (1982).

260. *Id.*

261. 638 F.2d 552, 559 (2d Cir. 1981).

262. *Id.*

263. *Id.*

264. 102 S. Ct. 2374, 2382 n.19 (1982).

positions would require familiarity with the Japanese language, products, product markets, or business practices.²⁶⁵ Notwithstanding this concession, the brief asserted that men and women not of Japanese origin could meet the requirements.²⁶⁶ Customer preferences, customs, or other "subjective criteria" were denounced, of course, by Avigliano.²⁶⁷

The brief for the United States as *amicus curiae* (bearing the name of, among others, the General Counsel of the EEOC) is also instructive. It maintained that most of the requirements listed by the Second Circuit were not "inextricably intertwined with a person's national origin as such, but are instead aspects of an expertise that could readily be acquired by persons *not* of Japanese national origin."²⁶⁸ Included as examples of expertise that could be acquired were knowledge of Japanese markets, products, and business practices, and familiarity with the Japanese parent enterprise.²⁶⁹ The United States brief also indicated that its draftsmen were "troubled" by the court of appeals' reference to customer preference as a ground supporting Japanese national origin as a BFOQ.²⁷⁰

The briefs of Avigliano and the United States ignore the significant differences between sex and national origin discrimination and between the domestic and international arenas. The legislative history for national origin as a BFOQ indicates that it was conceived as a broad exception, certainly not tied to whether the considerations are "inextricably intertwined" with an individual's national origin.²⁷¹ Trying to catalogue what is "inextricably intertwined" with a particular national origin and relevant to the employment relation is difficult, if not impossible. The vast majority of traits common to a national origin can be learned with varying degrees of effort and success by members of other national origins. Congress clearly did not intend to engage in a futile and illusory act when it created the BFOQ for national origin discrimination. Regrettably, no reported decisions deal with this exception.

In formulating criteria that establish national origin as a BFOQ, a court should consider the culture, customs, and business environment with which

265. Brief for Respondents and Cross-Petitioners at 34.

266. *Id.*

267. *Id.*

268. Brief for the United States as *Amicus Curiae* at 26 n.15 (emphasis in original). Compare the EEOC's brief before the Second Circuit in *Sumitomo*, which declared:

[I]t is evident that when the treaty and Title VII are read together, a limited number of executive and specialized positions in American subsidiaries of Japanese firms may qualify for the BFOQ exception if there is evidence that they are *critical to the subsidiary's relationship with its Japanese parent or that the jobs in question require such unique skills that they can only be performed by Japanese nationals.*

It continued:

The highest level policy-making positions—positions which require frequent personal or confidential relationships with the Japanese home office, which arguably could be performed effectively only by Japanese nationals—are likely to qualify under both Article VIII(1) of the Treaty and § 703(e) of Title VII.

EEOC Brief at 24 (emphasis added).

269. Brief for the United States as *Amicus Curiae* at 26 n.15.

270. *Id.*

271. See *supra* notes 195–97. See also B. SCHLEI & P. GROSSMAN, *supra* note 110, at 267.

the subject employee must interact.²⁷² One possible method of analysis is whether not hiring members of a particular national origin would undermine the essence of the business operation or position.²⁷³ To this extent the *Diaz*

272. For a description of Japanese general trading companies such as Sumitomo's parent company, Sumitomo Shoji Kabushiki Kaisha, see generally Krause & Sekiguchi, *Japan and the World Economy*, in *ASIA'S NEW GIANT: HOW THE JAPANESE ECONOMY WORKS* 389-97 (H. Patrick & H. Rosovsky eds. 1976); JAPAN EXTERNAL TRADE ORGANIZATION, *THE ROLE OF TRADING COMPANIES IN INTERNATIONAL COMMERCE* 1, 6 (1980). See on Japanese industrial organization, G. ALLEN, *THE JAPANESE ECONOMY* 120-35 (1981). The working of a Japanese corporation and the interaction of its managers and employees are considered in Johnson & Ouchi, *Made In America (Under Japanese Management)*, 52 HARV. BUS. REV. 61 (Sept.-Oct. 1974); see also W. OUCHI, *THEORY Z, HOW AMERICAN BUSINESS CAN MEET THE JAPANESE CHALLENGE* 39-55 (1981). As one article concluded:

[T]he U.S. Courts should not only consider the comparable conventional job requirements and skills required to perform those jobs, but also should consider the special sociocultural environment of the foreign parent company's home country and the unique management style and characteristics developed in those countries and practiced by their multinationals. We are not suggesting that "uniqueness" could become an escape clause to protect foreign MNCs from all charges of discrimination. It is a valid consideration, nevertheless, because culture-based differences in management style may not lend themselves easily to cross-cultural comparisons, and yet they may be very important if the foreign parent is to effectively control and direct its overseas operations, and also maintain unambiguous communications with the overseas affiliates.

Sethi & Swanson, *supra* note 122, at 518-19. The courts must be sensitive to these differences in evaluating a company's BFOQ defense since much more than knowledge of a foreign language and a company's method of operation is involved.

273. This assumes that neither article VIII(1) nor article VII(1), which gives nationals and companies of Japan the right to control and manage their enterprises in the United States, provides a basis for preferential employment of Japanese citizens. In his dissent in *Spieß* Judge Reavley touched on the possible impact of article VII(1). He stated:

Some of these practices may be justified by the need of Japanese investors "to control and manage enterprises which they have established or acquired." . . . That right is guaranteed by the Treaty in absolute terms, and United States law may not infringe upon that right unless there is a clear Congressional intent otherwise. If some of C. Itoh-America's discriminatory practices are protected by Article VII(1), I suspect that they could also claim protection from the BFOQ exception to Title VII.

643 F.2d 353, 369 n.19 (5th Cir. 1981). The Brief for the United States as Amicus Curiae in *Sumitomo* also recognized that article VII(1)'s right to control and manage could serve as the basis for an argument "that the discretion to select top-level 'executive personnel' in whom the nationals and companies have confidence is a necessary component of that right." *Id.* at 27 n.16. It is noteworthy that in analyzing the application of the BFOQ provision in The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976), some courts and the EEOC have given deference to legislative judgment or administrative rules. See *EEOC v. City of Janesville*, 630 F.2d 1254 (7th Cir. 1980) (since the city based its retirement program on the legislative judgment regarding retirement of protective service employees, it was not clear the city would not succeed in showing age BFOQ). Until 1981 the EEOC's interpretative guidelines sanctioned the Federal Aviation Administration's "Age 60 Rule" as a BFOQ. See 29 C.F.R. § 860.102(d) (1981).

If article VIII(1) is found to immunize certain foreign enterprises from the provisions of Title VII, one must determine which employees fall within the treaty categories of "executives," "technical experts," and "other specialists." One can consult a number of sources to make these determinations. First, the Department of State, which administers and enforces the immigration laws, has adopted regulations establishing standards for treaty trader aliens employed in the United States under Japanese and other FCN treaties. 22 C.F.R. § 41.40 (1982). Those regulations require that a treaty trader be

engaged in duties of a supervisory or executive character, or, if he is or will be employed in a minor capacity, he has the specific qualifications that will make his services essential to the efficient operation of the employer's enterprise and will not be employed solely in an unskilled manual capacity.

Id. § 41.40(a).

The Department of State has developed supplementary internal guidelines to be used in determining whether foreign nationals seeking entry into the United States are entitled to treaty trader status. See 9 Foreign Affairs Manual of the Department of State, reprinted in 6 C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* § 41.41, at 32-71 to 32-84 (1982). Those guidelines provide some definitions for categories of employees that may be helpful for purposes of judicial review of treaty rights in hiring.

Second, some guidance may be derived from statutes regulating labor relations and wages and hours worked when the statutes exempt certain categories of employees, such as supervisors or executives, from the

test is helpful. There should be no consideration of whether national origin characteristics are "inextricably intertwined" with the nationality (or whether they are primary or secondary), as is done in sex discrimination cases. For even though some aspects of Japanese culture, customs, and language can be learned, no substitute may exist for a person of Japanese national origin in negotiations or business dealings with other Japanese in Japan. The significant trait required, then, is the totality of all traits and experiences, tangible and intangible, possessed by an individual of Japanese national origin.²⁷⁴ This is not to say that each position in a subsidiary or branch will require a Japanese or other foreign national. The employer must demonstrate that the hiring of a person of Japanese or other national origin is reasonably necessary or essential²⁷⁵ to the business or the job in question. Assuming that the employer meets this burden, any customer preference involved is of no consequence. Customer preference is merged with (or emanates from) the need for an employee who can speak the language and is familiar with the customs and mores of the country concerned.

Indeed, a superficial analysis of the subsidiary's or branch's personnel needs could result in the conclusion that the knowledge of a foreign language, culture, and customs are all matters of customer preference because an employee engaged in foreign business dealings conceivably could function without this background. This conclusion ignores the requirements of a business that must deal with other nations and compete for customers. Driving a business out of foreign markets and eliminating the large proportion of jobs that require no special skills and are open to all American workers will not further

operation of their requirements. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. § 213(a)(1) (1976); Fair Labor Standards Act Regulations (interpreting bona fide executive employee exemption), 29 C.F.R. §§ 541.101-.119 (1981). These regulations have been interpreted by the courts. *See Donovan v. Burger King Corp.*, 675 F.2d 516 (2d Cir. 1982); *Lyles v. K-Mart Corp.*, 92 Lab. Cas. (CCH) ¶ 34,064 (M.D. Fla. 1981). This guidance will be useful in framing workable tests for each category rather than in determining the original intent of the treaty draftsmen. The Foreign Affairs Manual also contains guidelines for determining those aliens entitled to treaty investor status. *See* 9 Foreign Affairs Manual, *supra*, at n.4.

274. One article has suggested that to sustain the BFOQ defense,

[Foreign multinationals] must demonstrate the extent to which the unique characteristics are related to the proprietary technology and the production processes of the foreign parent; they must also show an understanding of the organizational procedure and philosophies that underlie the successful basis of two-way communication.

Sethi & Swanson, *supra* note 122, at 519. The job, according to the article, must be "one of a kind." Thus, it concludes that the BFOQ exception should be used for only two types of employees: "(1) the top two or three executives in the overseas affiliate and (2) specialists assigned to the overseas affiliate for short duration and for very specialized jobs." *Id.* This interpretation of the BFOQ exception, while relating to the Japanese situation, is unduly restrictive even in that context. Plainly, sales or marketing positions in American subsidiaries requiring substantial interaction with or travel in foreign nations could be subject to the exception. These positions normally will not be filled by executive personnel.

275. Larson warns:

At the present juncture, we should remind ourselves that "bona fide occupational qualification" is immediately followed by the words "reasonably necessary to the normal operation of that particular business or enterprise." Nothing could be plainer than the statutory intent that the particular enterprise is not expected to change its normal character or product as the price of compliance.

1 A. LARSON, *supra* note 194, § 15.20, at 4-20 (emphasis in original). The restriction on this language, according to Larson, is the term "reasonably necessary." *Id.*

the laudable goals of Title VII. To ignore or minimize the impact of deeply held foreign customs or beliefs is irrational when a business' very existence depends on the good will of persons possessing the customs or beliefs. This is particularly troublesome since deeply held American customs and sensitivities about personal privacy are accorded BFOQ status in the context of gender discrimination.²⁷⁶

While existing precedent makes gender BFOQs in the international context more problematic,²⁷⁷ the same test could resolve those problems. The touchstone for application of the BFOQ exemption in the international arena should be a business necessity test or a reasonably necessary to the business or position test. One must examine the positions alleged to require a gender or national origin BFOQ to determine their relationship to foreign customers, parent companies, and markets, and the amount of contact between the employee and the foreign country and its citizens. A court must also review the specific requirements of the position and the characteristics and customs of the nation and business community with which business is to be transacted. If a company can show that a particular national origin or sex is reasonably necessary to the position or the employer's business, a BFOQ should be established. In taking a contrary view by excluding foreign customer preferences from consideration, *Fernandez v. Wynn Oil Co.*²⁷⁸ is unnecessarily inflexible. Its conclusions regarding gender BFOQs should be reexamined if the international factual situation is found to make sex reasonably necessary to the position or the employer's business.

Holding national origin or sex a BFOQ in those relatively few cases in which it is reasonably necessary to the operation of an employer's business will result in the accommodation of the economic and commercial interests of the United States to its policy against employment discrimination. These BFOQs will deny few jobs to Americans, while gains in international trade and in the number of foreign-owned subsidiaries operating in the United States will create more available positions. This is particularly important because Congress did not intend Title VII to alter the customs, mores, or sensibilities of foreign nations. Finally, this construction of the BFOQ provision will affect the employment policies of businesses in the United States only to the extent that those businesses have substantial, direct dealings with one or more foreign countries. But for those dealings or the relationship with a

276. Most Japanese would not be concerned about having bathhouses segregated by sex as Americans would. This American concern for personal privacy is probably sufficient to establish a gender BFOQ, but under *Fernandez* the deeply held beliefs of other nations would not be found to be a sufficient reason to select employees to deal with those nations. Cf. *Brooks v. ACF Indus.*, 28 Fair Empl. Prac. Cas. (BNA) 1373 (S.D. W. Va. 1982). The authors do not suggest by this example that Americans' concern for sexual privacy should be disregarded, but only that deeply felt foreign customs and beliefs should not be dismissed summarily in considering the BFOQ provision.

277. If a court attempts to accommodate the interests of foreign-owned subsidiaries it may choose to require a higher level of business necessity for gender BFOQs because of the legislative history and case law interpreting that provision.

278. 653 F.2d 1273 (9th Cir. 1981).

foreign parent, the employing company in the United States probably would not exist. The proposed BFOQ test is compatible with Title VII because it requires proof that it is reasonably necessary or essential to fill a specific position with an individual of a particular national origin or sex. This test is, indeed, business necessity in its purest form.

3. *The Application of the Business Necessity Defense to Foreign Subsidiaries or Branches Operating in the United States*

The Supreme Court's decision expressed no opinion whether a business necessity defense would be available to Sumitomo.²⁷⁹ This portion of the Article will address the business necessity defense and its potential application to Sumitomo's hiring practices and the practices of other foreign-owned subsidiaries and branches.²⁸⁰

As has been discussed previously, the business necessity defense is applicable to cases of employment discrimination presented under the disparate impact theory.²⁸¹ That theory requires a plaintiff to demonstrate that the facially neutral selection device in question chooses applicants for employment "in a significantly discriminatory pattern."²⁸² If the plaintiff establishes that the selection device is discriminatory in effect, the employer has "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question."²⁸³ Once the employer proves that the challenged employment practice is job related, the plaintiff may then show that other selection devices without a similar discriminatory impact would likewise "serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'"²⁸⁴

The manifest relationship requirement of the business necessity test considers, according to some decisions, whether the discriminatory employment practice is necessary to safe and efficient job performance.²⁸⁵ To be necessary, however, it "need not be the *sine qua non* of job performance; indis-

279. 102 S. Ct. 2374, 2382 n.19 (1982).

280. See *supra* note 273.

281. See *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977).

282. *Id.* At least one decision appears to limit disparate impact analysis to the innate characteristics of sex, race, and national origin. See *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981) (employer's rule prohibiting its salesmen from speaking Spanish on the job unless communicating with Spanish-speaking customers does not discriminate on the basis of national origin under Title VII, despite its disparate impact on Mexican-Americans).

283. *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977). Contrast Justice Rehnquist's concurring opinion, in which he suggests: "Appellants, in order to rebut the prima facie case under the statute, had the burden placed on them to advance job-related reasons for the qualification. [citations omitted] This burden could be shouldered by offering evidence or by making legal arguments not dependent on new evidence." *Id.* at 339 (Rehnquist, J., concurring) (emphasis added).

284. *Id.* at 339 (Rehnquist, J., concurring) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975), and quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973)).

285. *Dothard v. Rawlinson*, 433 U.S. 321, 332 n.14 (1977); *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1262 (6th Cir. 1981).

pensibility is not the touchstone. Rather, the practice must substantially promote the proficient operation of the business."²⁸⁶

The BFOQ exception and the business necessity test both examine job relatedness;²⁸⁷ however, some sources believe that the BFOQ exception may be more difficult to sustain than the business necessity test.²⁸⁸

The brief of the United States in *Sumitomo* maintained that if Sumitomo were selecting employees on the basis of Japanese citizenship rather than national origin, the BFOQ exception would be inapplicable. This contention was based on the BFOQ exception's application when the employer "explicitly selects specifically on the basis of national origin."²⁸⁹ If no explicit selection existed, the brief declared that "[t]he issue then would be whether Sumitomo's selection of Japanese nationals . . . has the effect of discriminating impermissibly on the basis of national origin."²⁹⁰ Hence, the appropriate defense would be business necessity, not BFOQ.²⁹¹

If Avigliano could have established that Sumitomo's citizenship requirement had the effect of discriminating on the basis of national origin, the business necessity defense would have been available.²⁹² The issue before the district court then would have become whether a citizenship preference that has the effect of discriminating on the basis of national origin could be defended on the ground of business necessity.²⁹³

A court dealing with foreign-owned subsidiaries, other than Japanese, or with foreign branches that could take advantage of treaty rights, will be required to consider whether those treaty rights themselves constitute a form of business necessity.²⁹⁴ If the court finds no applicable treaty rights, then it

286. *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1262 (6th Cir. 1981). See also *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1280 (9th Cir. 1981), in which the court examined the business necessity defense, concluding: "[T]he [Supreme] Court's most recent application of the employer's Title VII burden of proof not only follows the standards set forth in *Griggs* and *Albemarle*, but implicitly approves employment practices that significantly serve, but are neither required by nor necessary to, the employer's legitimate business interest." *Id.* (emphasis added). In Comment, *The Business Necessity Defense to Disparate-Impact Liability under Title VII*, 46 U. CHI. L. REV. 911, 934 (1979), the author concluded that "[t]he holding in *Griggs* simply prevents employers from using uneconomic criteria—criteria unrelated to job performance—that decrease minority opportunities." *Id.* (emphasis in original).

287. 1 A. LARSON, *supra* note 194, § 12A.10, at 3-36; Lopatka, *supra* note 243, at 96 n.129.

288. See *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361, 370 n.15 (4th Cir. 1980). See also Lopatka, *supra* note 243, at 96 n.129 (under the BFOQ exception the considerations may be weighed differently so that a BFOQ may be more difficult to sustain than the defense of business necessity). Regarding age discrimination, the EEOC's new interpretations cite *Diaz* for the principle that the two defenses are the same in the area of public safety. Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. 47,724 and 47,725 (1981). For a discussion of the relationship between the business necessity defense and the BFOQ exception in the age discrimination context, see *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 n.28 (5th Cir. 1976).

289. Brief for the United States as Amicus Curiae at 25.

290. *Id.* (emphasis in original).

291. *Id.* at 25-26.

292. See *supra* text accompanying notes 163-85.

293. Brief for the United States as Amicus Curiae at 26.

294. The brief for the United States maintained:

Analysis of that question should include consideration of whether Article VIII(1) itself constitutes a legislative-type validation (as a "business necessity") of a citizenship preference (at least for top-level

must consider in each individual case the functions and requirements of the positions in question.

Included in the considerations for the application of the business necessity defense are the specific skills and training required for the position and the economic risks in hiring an unqualified applicant.²⁹⁵ A court should consider carefully the required interaction between the employee and foreign nationals and the need for knowledge of the foreign language, customs, mores, and business environment. As with the BFOQ exception, the court must consider the employer's need for an employee possessing all these characteristics and knowledge. To the extent that the business necessity test is broader than the BFOQ exception and focuses on the efficient operation of the business, it is more adaptable to the requirements of a foreign-owned subsidiary.²⁹⁶ Because the business necessity defense is a judicial creation, courts may have greater flexibility in adapting the defense to give sufficient considerations to an international business' needs or treaty rights.²⁹⁷ As with the BFOQ, customer preferences should be considered if they are simply a part of the overall need to have an employee with knowledge of the language, culture, or mores of a foreign country, or if the employer can produce independent evidence that these considerations have a manifest relationship to efficient job performance. This measure of proof will restrict greatly the number of positions in any enterprise properly subject to the defense. It will, nevertheless, prevent courts from labeling intangible, but significant, job related considerations arising from a foreign nation's language, culture, or mores as mere customer preferences to be dismissed summarily.

VI. CONCLUSION

The United States is currently a party to more than twenty bilateral FCN treaties. Each of these treaties contains substantially similar language giving the parties the right to engage specified personnel of their choice. Although *Sumitomo* raised a number of questions concerning the application and scope of this provision, the Supreme Court chose to resolve only the narrow issue of the nationality of American subsidiaries under the United States-Japan FCN

"executive" positions mentioned in that Article) that excuses a company of Japan from showing the job relatedness of a citizenship preference on a case-by-case basis.

Id. See also note 273 regarding defenses premised on article VII(1) of the Japanese FCN Treaty. See *supra* text accompanying notes 63-104 for the various methods of interpreting treaty provisions.

295. *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1262 (6th Cir. 1981).

296. A foreign-owned subsidiary's refusal to employ a nonforeign citizen may come under the analysis of disparate treatment discrimination formulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). This analysis of the subsidiary's employment practices may give greater flexibility because only a legitimate, nondiscriminatory reason for the challenged action need be articulated. The plaintiff, of course, would have an opportunity to demonstrate that the nondiscriminatory justification advanced by the employer was actually pretextual.

297. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 n.28 (5th Cir. 1976). A discussion of the development of the requirements of the business necessity defense is found in *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1275-80 (9th Cir. 1981). See also Comment, *supra* note 286, at 913. The Comment concludes that the business necessity defense has been applied too restrictively. For a contrary view, see *Blumrosen, Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972).

Treaty. As a result, it left for future consideration the possibility that American subsidiaries may be covered under other FCN treaties or that subsidiaries may assert the treaty rights of their parents in their own defense. In addition, the Court did not address the scope of the provisions when balanced against Title VII.

Courts confronted with the question whether an American subsidiary may rely directly on the “of their choice” provision must begin with the particular treaty. They must determine the intent of the parties regarding the status of subsidiaries by focusing on the treaty’s language, negotiating history, and the subsequent practice and statements of the governments. Even if a court arrives at an interpretation similar to that in *Sumitomo*, this result does not foreclose the right of the subsidiary to raise the treaty rights as a defense. Based on the relationship between the foreign parent and its American subsidiary, the court may conclude that the personnel policies are really those of the parent or that the subsidiary meets the tests of standing to assert the third-party rights of its parent.

Whether a court decides that a subsidiary has rights directly under the treaty or may rely indirectly on its parent’s rights, it still must determine the scope of the “of their choice” right. When considering national origin as a BFOQ in the international setting, courts must look to the provision’s legislative history and the requirements of the job position for guidance. The legislative history indicates that the BFOQ for national origin was intended to be a significant justification for discrimination. Attempting to limit the exception to traits inseparably intertwined with national origin unduly circumscribes the exception and is inconsistent with its legislative history. Moreover, while the consideration of customer preference for the purpose of the national origin BFOQ exception is an open question, the better policy arguments favor this use when essential or reasonably necessary to the position or business in question. Congress’ intention that Title VII not alter foreign prejudices and sensibilities supports the use of customer preferences in this narrowly defined area.

Gender-based BFOQs are the most difficult to resolve in the international context. Cases decided in domestic employment situations and the dicta in *Fernandez* militate against the consideration of customer preferences. The realities of foreign markets and foreign sensibilities, however, may require the acknowledgement of customer preferences when essential or reasonably necessary to the position or business in issue. This will be a crucial issue for future resolution.

Finally, in analyzing the business necessity defense, the courts should consider the skills, knowledge, and experience needed to perform successfully in the job. Because the business necessity defense is judicially created and focuses on whether the employment practice is job related, courts may have greater flexibility in adapting the defense to the realities of the international arena. The touchstone should be the employment practice’s manifest relationship to the business.

